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# Reflections on *Reves v. Ernst & Young*: Its Meaning and Impact on Substantive, Accessory, Aiding Abetting and Conspiracy Liability under RICO

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# REFLECTIONS ON *REVES V. ERNST & YOUNG*: ITS MEANING AND IMPACT ON SUBSTANTIVE, ACCESSORY, AIDING ABETTING AND CONSPIRACY LIABILITY UNDER RICO

By G. Robert Blakey\* and Kevin P. Roddy\*\*

There is nothing more difficult to take in hand, more perilous to conduct, or more uncertain in its success, than to take the lead in the introduction of a new order of things.

NICCOLO MACHIAVELLI, *THE PRINCE* 43  
(William K. Marriott trans. 1908).

In our complex society the accountant's certificate and the lawyer's opinion can be instruments for inflicting pecuniary loss more potent than the chisel or the crowbar.

Friendly, J, in *United States v. Benjamin*,  
328 F.2d 854, 863 (2d Cir.),  
*cert. denied*, 377 U.S. 953 (1964).

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\* William J. and Dorothy O'Neill Professor of Law, Notre Dame Law School; A.B. 1957, J.D. 1960, University of Notre Dame. Professor Blakey was the Chief Counsel of the Subcommittee on Criminal Laws and Procedures of the United States Senate in 1969-1970, when the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 941 (1970), was processed. *Compare* *Hilder v. Dexter* [House of Lords 1902] App. Cas. 474, 477 (Earl of Halsbury) ("[T]he worst person to construe [a statute] is the person who [was] responsible for its drafting. He is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed") and *State v. Partlow*, 91 N.C. 550, 552 (1884) (testimony of drafter of ambiguous statute held inadmissible) with *Kosak v. United States*, 465 U.S. 848, 856-57 & n.13 (1984) (Marshall, J.) ("[I]t is significant that the apparent draftsman of the crucial portion" of the statute so construed it and "it seems to us senseless to ignore entirely the views of its draftsman"). See also *Banque Worms v. Luis A. Duque Pena & Hijos, Ltd.*, 652 F. Supp. 770, 772 n.4 (S.D.N.Y. 1986) (Goettel, J.) ("The rather broad draftsmanship of RICO has resulted in its expansive application. A professor who served as a draftsman for the bill has stated that this broad application is what *he* intended. There is no indication, however, that the Congress which passed the bill was adopting *his* intentions") (emphasis in original) (citation omitted). Courts are not so reluctant to accept the writings of other professors who were draftsmen. See, e.g., *James M. Landis, The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29 (1959), cited with approval in *Aaron v. SEC*, 446 U.S. 680, 706 n.1 (1979) (Blackmun, J., concurring in part and dissenting in part); *Sanders v. John Nuveen & Co.*, 619 F.2d 1222, 1226 (7th Cir. 1980); *Woolf v. S.D. Cohn & Co.*, 515 F.2d 591, 605 n.6 (5th Cir. 1975); *Vohs v. Dickson*, 495 F.2d 607, 619 n.3 (5th Cir. 1974); *Lanza v. Drexel & Co.*, 479 F.2d 1277, 1296 n.52 (2d Cir. 1973); *Klein v. Computer Devices, Inc.*, 591 F. Supp. 270, 277 (S.D.N.Y. 1984); *SEC v. Lowe*, 556 F. Supp. 1359, 1363 (E.D.N.Y. 1983); *In re New York City Mun. Sec. Litig.*, 507 F. Supp. 169, 175 (S.D.N.Y. 1980). The difference may lie, not so much in the source of the opinion, but its content; it ought to rest on the character of the reasons supporting (or not) the opinion. See *Roma Construction Co. v. aRusso*, 96 F.3d 566, 577 n. 6 (1st Cir. 1996).

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The research in these reflections is current through July 15, 1996.

No one really knows a law thoroughly unless he knows what the courts have made of it.

MORRIS R. COHEN, *LAW AND THE SOCIAL ORDER* 133 (1932).

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## I. INTRODUCTION

In March 1993, accountants, attorneys and other professionals—who generally view RICO with suspicion—breathed a sigh of relief when they read the *Washington Post*: “People who lose money in thrifts and other businesses that go belly up because of wrongdoing can no longer use [RICO] to sue lawyers, accountants, or other advisers who played key roles in the enterprise.”<sup>1</sup> Unfortunately, this terse description of the Supreme Court’s decision issued the previous day in *Reves v. Ernst & Young*<sup>2</sup> may persuade professionals that they dropped an anchor in a tranquil safe-harbor, far from an exposure to the perils of the private enforcement provisions of RICO that authorize the recovery of treble damages and counsel fees for engaging in certain kinds of commercial frauds. The last chapter on the ultimate impact of the Supreme Court’s decision, however, is not yet written. In fact, a careful analysis of the Court’s opinion in the context of well-settled areas of criminal jurisprudence indicates that *Reves*’ impact should be far more nuanced; it should not result in creating a safe-harbor for errant professionals.

In 1970, Congress enacted the Organized Crime Control Act, Title IX of which is known as the Racketeer Influenced and Corrupt Organizations Act (“RICO”).<sup>3</sup>

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1. Joan Biskupic, *Supreme Court Limits Use of Racketeering Law*, WASH. POST, Mar. 4, 1993, at A1.

2. 507 U.S. 170 (1993).

3. Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, tit. IX, 84 Stat. 922, 941 (1970) [hereinafter RICO] (codified at 18 U.S.C. §§ 1961-1968 (1994)). The law review and related commentary on RICO is extensive. In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 481 n.2 (1985), the Supreme Court termed the bibliography in Anita C. Milner, *A Civil RICO Bibliography*, 21 CAL. W. L. REV. 09 (1985), “thorough.” For the best general treatments of the statute from a variety of perspectives, see generally CRIMINAL DIV., U.S. DEP’T OF JUSTICE, RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO): A MANUAL FOR FEDERAL PROSECUTORS (3d rev. ed. 1990); CRIMINAL DIV., U.S. DEP’T OF JUSTICE, CIVIL RICO: A MANUAL FOR FEDERAL PROSECUTORS (1988); G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237 (1982); G. Robert Blakey & Scott D. Caesar, *Equitable Relief Under Civil RICO: Reflections on Religious Technology Center v. Wollersheim: Will Civil RICO Be Effective Only Against White-Collar Crime?*, 62 NOTRE DAME L. REV. 526 (1987); G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009 (1980); G. Robert Blakey & Ronald Goldstock, *On the Waterfront: RICO and Labor Racketeering*, 17 AM. CRIM. L. REV. 341 (1980); G. Robert Blakey & Thomas A. Perry, *An Analysis of the Myths That Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: Mother of God—Is This The End of RICO?*, 43 VAND. L. REV. 51 (1990); Craig M. Bradley, *NOW v. Scheidler*, 1994 SUP. CT. REV. 129 (1995); Craig M. Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837 (1980); Barry Tarlow, *RICO Revisited*, 17 GA. L. REV. 291 (1983); Barry Tarlow, *RICO: The New Darling of the Prosecutor’s Nursery*, 49 FORDHAM L. REV. 165 (1980). See also Michael Goldsmith, *Judicial Immunity for White-Collar Crime: The Irony Demise of Civil RICO*, 30 HARV. J. ON LEGIS. 1 (1993); Michael Goldsmith, *RICO and Enterprise Criminality: A Response to Gerard E. Lynch*, 88 COLUM. L. REV. 774 (1988); Gerald E. Lynch, *A Reply to Michael Goldsmith*, 88 COLUM. L. REV. 802 (1988); Gerald E. Lynch, *RICO: The Crime of Being a Criminal (pts. 1-4)*, 87 COLUM. L. REV. 661, 920 (1987). For two symposia, see *Law and the Continuing Enterprise: Perspectives on RICO*, 65 NOTRE DAME L. REV. 873 *et. seq.* (1990); *The 20th Anniversary of the Racketeering Influenced and Corrupt Organization Act (1970-1990)*, 64 ST. JOHN’S L. REV. 701 *et. seq.* (1990). For the most consistently thoughtful student pieces, see Joseph E. Bauerschmidt, Note, *“Mother of Mercy—Is This the End of RICO?”—Justice Scalia Invites Constitutional Void for Vagueness Challenge to RICO Pattern*, 65 NOTRE DAME L. REV. 1106 (1990); Kim Cafaro, Note, *Reconsideration of Pattern in Civil RICO Offenses*, 62 NOTRE DAME L. REV. 83 (1986); Karen J. Ciupak, Note,

In addition to its private enforcement provisions,<sup>4</sup> RICO provides criminal

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*RICO and the Predicate Offenses: An Analysis of Double Jeopardy and Verdict Consistency Problems*, 58 NOTRE DAME L. REV. 382 (1982); William R. Cowden, Note, *Attorney Fee Forfeiture Under the Comprehensive Forfeiture Act of 1984: If It Works, Don't Fix It*, 63 NOTRE DAME L. REV. 535 (1988); Elizabeth D. De Armond, Note, *A Uniform Limitations Period for Civil RICO*, 61 NOTRE DAME L. REV. 495 (1986); Courtney Chetty Genco, Note, *"Whatever Happened to Durland?": Mail Fraud, RICO, and Justifiable Reliance*, 68 NOTRE DAME L. REV. 333 (1992); Nancy L. Ickler, Note, *Conspiracy to Violate RICO: Expanding Traditional Conspiracy Law*, 58 NOTRE DAME L. REV. 587 (1983); Henry A. LaBrun, Note, *Innocence by Association: Entities and the Person-Enterprise Rule Under RICO*, 63 NOTRE DAME L. REV. 179 (1988); Donald E. Lee, Note, *The Availability of Equitable Relief in Civil Causes of Action in RICO*, 59 NOTRE DAME L. REV. 945 (1984); Leigh Ann MacKenzie, Note, *Civil RICO: Prior Criminal Conviction and Burden of Proof*, 60 NOTRE DAME L. REV. 566 (1985); Judith A. Morse, Note, *Treble Damages Under RICO: Characterization and Computation*, 61 NOTRE DAME L. REV. 526 (1986); Thomas S. O'Neill, Note, *Functions of the RICO Enterprise Concept*, 64 NOTRE DAME L. REV. 646 (1989); Brendan Rielly, Note, *Using RICO to Fight Environmental Crimes: The Case for Listing Violations of RCRA as Predicate Offenses for RICO*, 70 NOTRE DAME L. REV. 651 (1995); Michelle J. Stahl, Comment, *Oscar v. University Students Cooperative Ass'n: Can Citizens Use RICO to Rid Neighborhoods of Drug Houses?*, 67 NOTRE DAME L. REV. 799 (1992); J. Robert Suffoletta, Note, *Who Should Pay When Federally Insured Pension Funds Go Broke? A Strategy for Recovering from the Wrongdoers*, 65 NOTRE DAME L. REV. 308 (1990). See *infra* APPENDIX C (IMPLEMENTATION) (discussing enactment and use of RICO).

4. The private enforcement provisions of RICO were modeled after similar provisions in the antitrust statutes. See *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 267-68 (1992) (collecting decisions); S. REP. NO. 617, 91st Cong., 1st Sess. 81 (1969); H.R. REP. NO. 1549, 91st Cong., 2d Sess. 56-70 (1970), reprinted in 1970 U.S.C.C.A.N. 4007. Compare 18 U.S.C. § 1964(c) (RICO), with 15 U.S.C. § 15 (Clayton Act). Like the antitrust statutes, RICO's treble damage provision "create[s] a private enforcement mechanism that . . . deter[s] violators and . . . provide[s] ample compensation to the victims." *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982). RICO's private enforcement provisions "provide strong incentives to civil litigants and are integral to the effort of Congress to enlist the aid of civil claimants in deterring" violations of RICO. *Alcorn County v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160, 1165 (5th Cir. 1984). Such "private . . . litigation is one of the surest weapons for effective enforcement [of the law]," *Leh v. General Petroleum Corp.*, 382 U.S. 54, 59 (1965) (quoting *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965)); it "provide[s] a significant supplement to the limited resources available to [the government]." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979). RICO and the antitrust statutes are well-integrated. "There are three possible kinds of force which a firm can resort to: violence (or the threat of it), deception, or market power." CARL KAYSER & DONALD F. TURNER, *ANTI-TRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS* 17 (1959). RICO focuses on the first two; antitrust focuses on the third. As the antitrust laws seek to maintain economic freedom in the market place, so, too, RICO seeks to promote integrity in the marketplace, physical or fiscal. See generally Blakey & Caesar, *supra* note 3, at 531 n.17 (history of idea of treble damages, adoption in other federal statutes, and economic analysis of wisdom of treble damages, particularly in fraud area); Morse, *supra* note 3, at 533-34:

Treble damages have unique characteristics that can be creatively used to address the problems of sophisticated crime. Treble damages can be used to (1) encourage private citizens to bring RICO actions, (2) deter future violators, and (3) compensate victims for all accumulative harm. These multiple and convergent purposes make the treble damage provision a powerful mechanism in the effort to vindicate the interests of those victimized by crime. (citations and footnotes omitted).

Between 1960 and 1980, of the 22,585 civil and criminal cases brought under the antitrust laws by the government or private parties, 84% were instituted by private plaintiffs. U.S. DEP'T OF JUSTICE, *SOURCE BOOK OF CRIMINAL JUSTICE STATISTICS* 31 (1981). Civil enforcement, not criminal enforcement, is the backbone of the antitrust laws. See, e.g., Block, Nold & Sidak, *The Deterrent Effect of Antitrust Enforcement*, 89 J. POL. ECON. 429, 440 (1981) ("Neither imprisonment nor monetary penalties pose . . . a credible threat to colluding firms . . . [T]he deterrent effect . . . [comes] from . . . the likelihood of an award of private treble damages."). Civil RICO litigation, particularly in the area of fraud, promises a similar impact. See also *Mosler v. S/P Enters.*, 888 F.2d 1138, 1143-44 (7th Cir. 1989) (Easterbrook, J.) (RICO fraud) (stating that

Because [such] frauds are concealable, trebling is important to produce proper incentives. If

sanctions<sup>5</sup> for certain proscribed conduct carried out by, through, or against enterprises through a pattern of racketeering activity, including violence, the provision of illegal goods and services, corruption and fraud<sup>6</sup> in the arena of accountants and lawyers as well as in the underworld of mobsters and murderers. Congress mandated that RICO be "liberally construed to effectuate its remedial purposes."<sup>7</sup> The Supreme Court, too, emphasizes that RICO's " 'remedial pur-

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perpetrators pay what they took when they get caught, and keep the proceeds the rest of the time, then fraud is profitable. If victims recoup only what they lost, and face the burdens and uncertainties of the legal process plus the costs of their own counsel, then victory will not make them whole, and the shortfall may mean that victims will not vigorously investigate and litigate. Trebling [under RICO] addresses both halves of this equation.).

(citations omitted).

Studies under the antitrust statutes show that most treble damage suits are now settled at close to actual damages. STAFF OF HOUSE COMM. ON THE JUDICIARY, 98TH CONG., 2D SESS., STUDY OF THE ANTI-TRUST TREBLE DAMAGE REMEDY 14 (Serial No. 8 1984). A similar pattern is developing under RICO. See Blakey & Perry, *supra* note 3, at 919 n.189 (detailed analysis of the considerations of economics and justice in bringing and settling complex RICO litigation).

5. The criminal sanctions of RICO are not the central focus of these materials, but they merit an extended discussion. See generally APPENDIX A (CRIMINAL SANCTIONS).

6. These materials presuppose a knowledge of the federal law of fraud. Unfortunately, many law professors, many practitioners, and too many judges "confus[e] mail [or wire] fraud with common law fraud." *Armco Indus. Credit Corp. v. SLT Warehouse*, 782 F.2d 475, 481 (5th Cir. 1986). The tendency is to restrict "defraud," the key statutory element in federal law, to the common law deceit elements of misrepresentation, omission, materiality, and detrimental reliance. That tendency is misguided. An extensive treatment of federal fraud law is, therefore, warranted. See generally APPENDIX B ("DEFRAUD").

7. Organized Crime Control Act of 1970, Pub. L. No. 91-452, tit. IX, 84 Stat. 922, 941 (1970). Such clauses originated in the codification movement of the 19th century. Edward Livingston suggested the rejection of the old common law rule of strict construction in the farsighted code he drafted for Louisiana between 1820 and 1825. See EDWARD LIVINGSTON, COMPLETE WORKS ON CRIMINAL JURISPRUDENCE 23 (1873 ed.); 2 *id.* at 14 ("all penal laws whatever are to be construed according the plain import of their words"). Livingston's suggestion for Louisiana was followed by David Dudley Field in his influential draft of codes of penal law and criminal procedure for New York. See THE CODE OF PENAL LAW 5 (1865 ed.) ("fair import"); THE CODE OF CRIMINAL PROCEDURE OF THE STATE OF NEW YORK 470-71 (1850 ed.) (revised code to be given "liberal construction" because the old rule had no support in any "principle of substantial justice, and . . . [its] highest aim, practically considered, seem[ed] to be, to render that law inconsistent with its spirit and as a consequence, absurd and ridiculous"). Ultimately, Livingston's and Field's work formed the intellectual basis for the Federal Rules of Civil and Criminal Procedure. See CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 104 (1969).

Judicial hostility to change through legislation was common in the 19th century.

[W]here [judges] were not ready boldly to declare [it] unconstitutional, [they were ready] to interpret it so restrictively as to narrow its effect.

. . . These factors found expression in the abstract canons of statutory interpretation . . . : strict construction of statutes in derogation of the common law; strict construction of penal statutes, or of legislation that imposed 'drastic' burdens, or of legislation that imposed special damages . . .

. . . The effect was to put a primarily obstructive, if not destructive connotation on the process of statutory interpretation.

JAMES W. HURST, THE GROWTH OF AMERICAN LAW 186 (1950). Legislatures reacted and "[i]t became standard practice in drafting statutes to insert a preamble stating broadly the purpose of the act and to close with a provision declaring that the statute should be liberally construed." DAVID WIGDOR, ROSCOE POUND: PHILOSOPHER OF LAW 174 (1974); see also EDWIN W. PATTERSON, JURISPRUDENCE: MEN AND IDEAS OF THE LAW 421 (1953); Blakey, *supra* note 3, at 245 n.25 (review of statutes and relevant decisions). In fact, a majority of states have abolished the

poses' are nowhere more evident than in the provision of a private action for those injured by racketeering activity."<sup>8</sup> Accordingly, no special class within our society—least of all professionals who ought to be held to the highest standards—

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common law rule. Judicial hostility, however, continues into the 20th century. See, e.g., *Sedima*, 473 U.S. at 529 (Powell, J., dissenting) (liberal construction applies only to criminal provisions); cf. *Saine v. A.I.A., Inc.*, 582 F. Supp. 1299, 1305 (D. Colo. 1984) (same).

Courts recognize that strict construction is not of constitutional dimension. See, e.g., *Tarrant v. Ponte*, 751 F.2d 459, 466 (1st Cir. 1985) (rejecting claim that rule of construction had been transformed into a constitutional presumption); *Blakey*, *supra* note 3, at 288 n.150 ("[T]he rule of strict construction has never been accorded independent constitutional status."). Circuit courts faithfully follow its mandate in criminal litigation. In *re Billman*, 915 F.2d 916, 921 (4th Cir. 1990), *cert. denied*, 500 U.S. 952 (1991); *United States v. Angiulo*, 897 F.2d 1169, 1216 (1st Cir.), *cert. denied*, 498 U.S. 845 (1990); *United States v. Perholtz*, 842 F.2d 343, 353 (D.C. Cir.), *cert. denied*, 488 U.S. 821 (1988); *United States v. Mazzei*, 700 F.2d 85, 89-90 (2d Cir.), *cert. denied*, 461 U.S. 945 (1983); *United States v. Godoy*, 678 F.2d 84, 86-87 (9th Cir. 1982), *cert. denied*, 464 U.S. 959 (1983); *United States v. Hartley*, 678 F.2d 961, 988 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); *United States v. Sutton*, 642 F.2d 1001, 1003 (6th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981); *United States v. Grzywacz*, 603 F.2d 682, 685-86 (7th Cir. 1979), *cert. denied*, 446 U.S. 935 (1980); *United States v. Elliott*, 571 F.2d 880, 897-98 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978); *United States v. Frumento*, 563 F.2d 1083, 1090-91 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978). Accordingly, litigants expecting courts to ignore the Liberal Construction Clause in civil litigation should be disappointed. For different views of the relationship between "liberal" and "fair import" construction, compare John S. Baker, Jr., *Nationalizing Criminal Law: Does Organized Crime Make it Necessary or Proper?* 16 RUTGERS L.J. 495, 560-66 (1985) with Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345 (1994). Nevertheless, while the Liberal Construction Clause "obviously seeks to insure that Congress' intent is not frustrated by an overly narrow reading of [RICO], . . . it is not an invitation to apply RICO to new purposes that Congress never intended. Nor does the clause help . . . to determine what purposes Congress had in mind. Th[e]se must be gleaned from the statute through the normal means of interpretation. The clause 'only serves as an aid for resolving an ambiguity; it is not to be used to beget one.' " *Reves*, 507 U.S. at 183 (quoting *Sedima*, 473 U.S. at 492 n.10). Similarly, the Principle of Lenity, its identical twin, ought not be made to do service beyond its purpose. *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 395-96 (1867), summarizes its traditional understanding:

We are not unmindful that penal laws are to be construed strictly. It is said that this rule is almost as old as construction itself. But whenever invoked it comes attended with qualifications and other rules no less important. It is by the light which each contributes that the judgment of the court is to be made up. The object in construing penal, as well as other statutes, is to ascertain the legislative intent. That constitutes the law. If the language be clear it is conclusive. There can be no construction where there is nothing to construe. The words must not be narrowed to the exclusion of what the legislature intended to embrace; but that intention must be gathered from the words, and they must be such as to leave no room for a reasonable doubt upon the subject. It must not be defeated by a forced and over-strict construction. The rule does not exclude the application of common sense to the terms made use of in the act in order to avoid an absurdity, which the legislature ought not to be presumed to have intended. When the words are general and include various classes of persons, there is no authority which would justify a court in restricting them to one class and excluding others, where the purpose of the statute is alike applicable to all. The proper course in all cases is to adopt that sense of the words which best harmonizes with the context, and promotes in the fullest manner the policy and objects of the legislature. The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular instead of the more narrow technical one; but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent.

The Principle of Lenity is an injunction to exercise reasonable judgment, not gratuitously to undermine a legislative scheme. *United States v. Aguilar*, 115 S. Ct. 2357, 2362 (1995) (Rehnquist, C.J.) (Court "traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress and out of a concern that 'a fair warning should be given' ") (citation omitted).

8. *Sedima*, 473 U.S. at 498.

should expect to be given a safe harbor under RICO, and certainly not from its private enforcement provisions.<sup>9</sup>

In *Reves*, the Supreme Court interpreted the “conduct” and “participate” elements of § 1962(c) of RICO,<sup>10</sup> which reads

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to *conduct* or *participate*, directly or indirectly, in the *conduct* of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.<sup>11</sup>

A divided Court affirmed a decision of the Eighth Circuit,<sup>12</sup> and adopted its intermediate test of civil liability under RICO, holding that a RICO defendant must himself participate in the “operation or management” of the enterprise in order to be subject to RICO liability.<sup>13</sup> Writing for the majority, Justice Blackmun concluded that the word “conduct” in § 1962(c) requires “some degree of direction,” while the term “participate” requires “some part in that direction.”<sup>14</sup> Thus, “[i]n order to ‘participate, directly or indirectly, in the conduct of such enterprise’s affairs,’ ”<sup>15</sup> an auditing accountant or counselling lawyer “must have some part in directing those affairs.”<sup>16</sup> Justice Blackmun emphasized that

the word ‘participate’ makes clear that RICO liability is not limited to those with primary responsibility for the enterprise’s affairs, just as the phrase ‘directly or indirectly’ makes clear that RICO liability is not limited to those with a formal position in the enterprise, but *some* part in directing the

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9. Chief Justice Burger aptly summarized the unique role of the independent auditor:

An independent certified public accountant performs a different role. By certifying the public reports that collectively depict a corporation’s financial status, the independent auditor assumes a public responsibility transcending any employment relationship with the client. The independent public accountant performing this special function owes ultimate allegiance to the corporation’s creditors and stockholders, as well as to the investing public. This ‘public watchdog’ function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust. To insulate from disclosure a certified public accountant’s interpretations of the client’s financial statements would be to ignore the significance of the accountant’s role as a disinterested analyst charged with public obligations.

United States v. Arthur Young & Co., 465 U.S. 805, 817-18 (1984); see also *Hartwell*, 73 U.S. (6 Wall.) at 396 (“When the words are general and include various classes of persons, there is no authority which would justify a court in restricting them to one class and excluding others, where the purpose of the statute is alike applicable to all.”); United States v. Stites, 56 F.3d 1020, 1022 (9th Cir. 1995) (fraud by professionals is “more heinous.”). For a discussion of the role of accountants, see *infra* note 33.

10. *Reves*, 507 U.S. 170.

11. 18 U.S.C. § 1962(c) (1994) (emphasis added).

12. *Arthur Young & Co. v. Reves*, 937 F.2d 1310 (8th Cir. 1991), *aff’d*, 507 U.S. 170 (1993).

13. *Reves*, 507 U.S. at 178-79.

14. *Id.* at 179.

15. *Id.* (quoting § 1962(c)).

16. *Id.*

enterprise's affairs is required.<sup>17</sup>

The Court concluded that the performance of two audits by an agricultural cooperative's accounting firm—without consulting with the cooperative's board of directors—did not suffice to establish that the professionals participated in the “operation or management” of the cooperative, the alleged RICO enterprise. Accordingly, the court rejected both the less restrictive test of the Eleventh Circuit, which did not require management-level participation in the affairs of the enterprise,<sup>18</sup> and the more restrictive test of the District of Columbia Circuit, which required “significant control over or within an enterprise”.<sup>19</sup>

Commentators have expressed different views on whether the *Reves* decision will free professionals—attorneys, accountants, brokers, consultants, financiers and the like—from RICO liability.<sup>20</sup> While the Court's decision in *Reves* clarifies the potential liability under § 1962(c) of so-called “outsiders” to a RICO enterprise, it does *not* absolve them of liability where they:

- (1) participate in the operation or management of the enterprise, that is, where they “take part in” directing the enterprise's affairs; or
- (2) are accessories before the fact to or aid and abet those who operate or manage the enterprise; or
- (3) enter into a conspiracy with those who operate or manage the enterprise.

An examination of these distinct theories of primary and secondary liability is required to bring into focus the relatively narrow and carefully balanced holding of *Reves*. Indeed, the Supreme Court's express rejection of the District of Columbia Circuit's more restrictive standard of liability for outsiders' violations of § 1962(c)

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17. *Id.* (emphasis in original) (footnote omitted).

18. *Bank of Am. Nat'l Trust & Sav. Ass'n v. Touche Ross & Co.*, 782 F.2d 966, 970 (11th Cir. 1986). For a discussion of the *Bank of America* decision, see *infra* notes 140-141 and accompanying text.

19. *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 913 F.2d 948, 954 (D.C. Cir. 1990) (en banc), *cert. denied*, 501 U.S. 1222 (1991). For a discussion of the *Yellow Bus* decision, see *infra* notes 142-146 and accompanying text.

20. Compare Douglas McLeod, *RICO Ruling Wins Applause*, BUS. INS., Mar. 15, 1993, at 1 (“The ruling will effectively bar many civil RICO claims against professional firms that do work for failed companies like insurers and savings & loans.”), and Harvey L. Pitt & Dixie L. Johnson, *Freeing Corporate Professional Advisers From the Threat of RICO Liability*, N.Y.L.J., Mar. 15, 1993, at 1 (*Reves* “spells relief to accountants and attorneys whose potential for treble damage liability . . . has been severely curtailed”) (footnote omitted), and David G. Savage, *High Court Limits Use of RICO Act on Advisers*, L.A. TIMES, Mar. 4, 1993, at D1 (“The Supreme Court, in a blow to investors and government officials trying to recover money from failed savings institutions, ruled . . . that outside accountants, lawyers and investment bankers cannot be sued under the federal anti-racketeering law for their roles in massive frauds”), with Paul M. Barrett, *High Court Gives Accountants a Shield Against Civil Racketeering Lawsuits*, WALL ST. J., Mar. 4, 1993, at A3 (*Reves* did not “disallow racketeering lawsuits alleging that professionals were directly involved in fraud”), and Marcia Coyle, *RICO Limits Set for Professionals*, NAT'L L.J., Mar. 15, 1993, at 3 (“Some professionals were hoping to get a ‘safe harbor, an insider-management-only rule,’ says Professor [G. Robert] Blakey. ‘They didn’t get it; they got a management rule that an outsider associated with the operation or management is going to go down.’ . . . Ultimately, it will take more litigation to tell how the decision affects lawyers and other professionals whose services are broad and not always precise, says Kathryn A. Oberly, Ernst & Young’s associate general counsel who argued the case”).

ought to demonstrate that *Reves* was not the creation of an exclusion from RICO liability for so-called "professional defendants."

By examining *Reves* and placing it in its proper factual and legal context, these reflections:

(1) demonstrate the pressing need for RICO's deterrent and compensatory remedies to control the sad facts of white-collar crime by exposing professionals' deep involvement in a variety of fraudulent financial schemes, specifically the recent savings and loan debacle;

(2) discuss the *Reves* decision and its significance;

(3) examine the language, legislative history, and purpose of § 1962(c), as analyzed in pre-*Reves* circuit and district court criminal and civil RICO decisions construing and applying § 1962(c)'s "conduct" and "participate" elements, to show how the Court changed—and did not change—the law in *Reves*;

(4) give positive and defensible concrete meaning to the "operation or management" test formulated by the Court in *Reves*;

(5) analyze and critique the lower federal and state courts' interpretation and application of *Reves* since its decision in 1993; and

(6) conclude that *Reves* is not—and ought not be made into—a safe-harbor for errant professionals.

## II. PROFESSIONAL INVOLVEMENT IN WHITE-COLLAR CRIME

In recent years, and with increasing regularity, attorneys, accountants, investment bankers, brokers, consultants, and other professionals have been named as defendants in fraud-related civil actions brought by investors, creditors, and others seeking to recover losses incurred when financial institutions fail or business transactions and investments result in losses.<sup>21</sup> For example, lawyers and accountants were named as defendants in securities fraud, civil RICO, and legal malpractice lawsuits arising out of this country's savings and loan crisis.<sup>22</sup> In one

21. See generally Neil Cohen, *Should Silent Complicity Constitute "Participation" Under § 1962(c)?*, 16 RICO L. RPTR. 524 (1992); Jed Rakoff, *Will the Supreme Court Come to Terms With RICO?*, 16 RICO L. RPTR. 495 (1992); Kevin P. Roddy, *Section 1962(c)'s "Conduct" and "Participate" Elements and Professionals' Liability For Violating RICO*, 16 RICO L. RPTR. 500 (1992); Jay K. Wright, *Why Are Professionals Worried About RICO?*, 65 NOTRE DAME L. REV. 983 (1990).

Contrary to some professional defendants' point of view, the potential recovery of damages from their "deep pockets" is not the only reason why they are sued. Under RICO's provisions, such defendants cannot be held liable without proper allegations and proof that they committed, were an accessory before the fact to, aided and abetted, or conspired to commit the RICO violation. See 18 U.S.C. § 1961(1) (1994) (definition of "racketeering activity"); 18 U.S.C. § 1962(a)-(d) (1994) (liability provisions); 18 U.S.C. § 1964(c) (1994) (civil liability provision). Since 1985, however, professional defendants and their lobbyists have sought to eliminate or eviscerate RICO. See generally Blakey & Goldstock, *supra* note 3, at 857 n.14 (review of various interest groups involved in RICO "reform"). Nevertheless, throughout this lengthy debate, proof is absent that innocent persons or entities are compelled to pay RICO damages, whether by settlement or judgment, because of some peculiar defect in the process of charging or proving RICO liability. See also *infra* note APPENDIX I (SECURITIES FRAUD REFORM).

22. According to Robert O'Malley, one of the founders of the Attorneys Liability Assurance Society (ALAS), a

recently concluded civil action, *In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig.* ("ACC/Lincoln Savings"),<sup>23</sup> three national law firms—New York's Kaye, Scholer, Fierman, Hays & Handler,<sup>24</sup> Chicago's Sidley &

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mutual insurance company owned by 375 large law firms, during the past fifteen years at least 14 settlements of \$20 million or more have been made in claims against law firms, including several monumental settlements reached with attorney defendants in the *ACC/Lincoln Savings* case discussed below. See *infra* notes 23-36 and accompanying text (discussing *ACC/Lincoln Savings* litigation). Among the most notable settlements, Denver's Sherman & Howard paid \$26.5 million to settle a malpractice claim arising from its representation of Silverado Banking, Savings & Loan Association, which the Federal Deposit Insurance Corporation (FDIC) took over in December, 1988; Philadelphia's Blank, Rome, Comisky & McCauley agreed to pay the Federal Savings & Loan Insurance Company (FSLIC) and defrauded investors more than \$50 million to settle malpractice claims arising out of its representation of the failed Sunrise Savings & Loan in Florida; New York's Rogers & Wells paid \$40 million in an out-of-court settlement related to its former client, J. David Dominelli, and his investor fraud case in San Diego; Baltimore's Venable, Baetjer & Howard agreed to pay \$27 million to settle a savings and loan-related lawsuit; and Chicago's Lord, Bissell & Brook paid \$19 million to settle claims resulting from its representation of the National Mortgage Equity Corp. and a fraudulent mortgage investment scheme. See Emily Couric, *The Tangled Web*, 79 A.B.A. J. 64, 65 (1993).

Defrauded investors in this type of litigation often assert claims against defendant professionals under the Securities Act of 1933, the Securities Exchange Act of 1934 and their state law equivalents. The liability of attorneys, accountants, investment bankers, underwriters and other professionals under the anti-fraud provisions of federal and state securities laws is beyond the scope of this article. See *infra* APPENDIX I (SECURITIES FRAUD REFORM). For discussions of these theories of liability as applied to professionals, see John P. Freeman & Nathan M. Crystal, *Scienter in Professional Liability Cases*, 42 S.C. L. REV. 783 (1991); Arthur Mathews, *Shifting the Burden of Losses in the Securities Markets: The Role of Civil RICO in Securities Litigation*, 65 NOTRE DAME L. REV. 896 (1990); Marc I. Steinberg, *Attorney Liability Under the Securities Laws*, 45 SW. L.J. 711 (1991); Suffoletta, *supra* note 3, at 399-40, 371.

23. 845 F. Supp. 1377 (D. Ariz. 1993), *aff'd*, No. 93-15131, 1994 U.S. App. LEXIS 13184 (9th Cir. May 23, 1994). In 1965, Justice Douglas suggested the adoption of an editorial policy requiring each author of a law review essay to indicate his special interest in the subject matter of his article. William O. Douglas, *Law Reviews and Full Disclosure*, 40 WASH. L. REV. 227, 229 (1965). Justice Douglas' suggestion is seldom followed. The *ACC/Lincoln Savings* class action, in which one of our number (Roddy) served as one of several co-lead trial counsel for plaintiffs and the other (Blakey) served as consultant to plaintiffs' counsel, was brought by investors in the now-bankrupt American Continental Corporation ("ACC"). ACC was controlled by now twice-convicted felon Charles H. Keating, Jr., who used the premises of ACC's wholly-owned, federally-insured thrift, Lincoln Savings & Loan ("Lincoln Savings"), to peddle to elderly victims hundreds of millions of dollars worth of junk bonds that became worthless when ACC declared bankruptcy and federal regulators seized Lincoln Savings in April 1989. Keating's fraudulent schemes caused one of the most catastrophic savings and loan failures in American history, estimated to cost the taxpayers over \$2.5 billion. The ensuing class action litigation resulted in several reported district court decisions, including *In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. 1424 (D. Ariz. 1992) (denying defendants' motions for summary judgment); 140 F.R.D. 425 (D. Ariz. 1992) (denying defendants' motion for class decertification); 782 F. Supp. 1382 (D. Ariz. 1991) (denying defendants' motions for summary judgment; and [1990-1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶95,704 (D. Ariz. Oct. 31, 1990) (certifying defendant classes of law firm and accounting firm partners). In addition to our involvement in the *ACC/Lincoln Savings* class action, one of our number (Roddy) also authored a brief in *Reves*. Brief of Amicus Curiae for the National Association of Securities and Commercial Law Attorneys (NASCAT) in Support of Petitioners, *Reves v. Ernst & Young*, 507 U.S. 170 (1993) (No. 91-886) (with Jonathan W. Cuneo and William S. Lerach). So, too, did another of our number (Blakey). Brief of Amicus Curiae for the Trial Lawyers for Public Justice, P.C. in Support of Petitioners, *Reves v. Ernst & Young*, 507 U.S. 170 (1993) (No. 91-886) (with Priscilla R. Budeiri and Arthur H. Bryant).

24. Kaye Scholer, ACC/Lincoln Savings' principal outside counsel, was accused of aiding and abetting Keating's fraudulent scheme to mislead investors by assisting in the preparation of a misleading securities prospectus. Bondholders alleged that Kaye Scholer: (1) knowingly assisted Keating and his confederates in



Austin,<sup>25</sup> and Cleveland's Jones, Day, Reavis & Pogue<sup>26</sup>—paid \$85 million in settlements to defrauded investors to escape liability for their alleged wrongdoing. In that class action, ACC's stockholders and bondholders ultimately received settlements totaling \$260 million from the professional defendants—including \$103 million paid by three of the so-called "Big Six" accounting firms (\$64 million from Arthur Young & Co., \$30 million from Arthur Andersen & Co., and \$9 million from Touche Ross & Co.), as well as \$80 million from now-bankrupt investment bank Drexel Burnham Lambert and now-convicted felon Michael R. Milken. Additionally, following a three-month trial in the District of Arizona, the

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carrying out a fraudulent scheme to make worthless ACC subordinated debentures appear safe and sound to the investing public; (2) assisted in forging documents to cover Lincoln's unsafe and unsound practices; and (3) lent credibility to unsound debentures by permitting the use of the Kaye Scholer name in connection with the public offering. Although the law firm characterized investors' claims as "frivolous" and "ridiculous" when they were initially filed in 1989, Rita H. Jensen, *S&L Scandal Snares a Big Firm*, NAT'L L.J., May 29, 1989, at 3, just one year later, Kaye Scholer paid \$20 million to settle those investor claims. Louise Kertesz, *Law Firm Settles for \$20 Million; Fraud Alleged in Keating Company Bond Sales*, BUS. INS., June 25, 1990, at 38; George Williamson, *Law Firm in Lincoln S&L Suit Agrees to Pay \$20 Million*, S.F. CHRON., June 16, 1990, at A6; see also Note, *Securities Attorneys Face Liability for Wrongs of Their Corporate Clients*, 5 J. OF LEGAL COMMENT. 403, 406-08 (1990) (detailing Kaye Scholer's involvement in Keating's and ACC/Lincoln's multi-faceted fraudulent schemes).

Two years later, and less than one week after the Resolution Trust Corporation (RTC) filed suit, Kaye Scholer agreed to pay an additional \$41 million to settle government accusations that it had improperly withheld damaging information about Lincoln Savings from federal regulators conducting a 1986 exam of the thrift institution. Don J. DeBenedictis, *The Big Freeze*, 78 A.B.A. J. 57 (1992); Stephanie Goldberg, *Welcome to the New Uncertainty: What is the Role of Counsel During a Regulatory Examination That is Clearly Adversarial?*, 78 A.B.A. J. 50, 51 (1992); Rita H. Jensen, *Kaye Scholer's Lincoln Woes*, NAT'L L.J., Mar. 16, 1992, at 1; Stephen Labaton, *Law Firm Will Pay A \$41 Million Fine In Savings Lawsuit*, N.Y. TIMES, Mar. 9, 1992, at A1; J. Podgers, *Changing the Rules*, 78 A.B.A. J. 53 (1992); Amy Stevens & Paulette Thomas, *How a Big Law Firm Was Brought to Knees By Zealous Regulators*, WALL ST. J., Mar. 13, 1992, at A1.

The success of this litigation led to the legislative curtailing of Arizona's little RICO statute. Albert K. Karr, *Arizona Scales Back Racketeering Law*, WALL ST. J., May 3, 1993, at B2.

25. Sidley & Austin allegedly fended off federal regulators' attempts to close Lincoln Savings in 1987-1988 through misrepresentations and threats of litigation to impose personal liability upon federal regulators. The firm termed investors' claims meritless and frivolous when they were filed, but in 1991 paid \$34 million to settle those RICO and securities fraud claims. James S. Granelli, *Getting Their Day in Court*, L.A. TIMES, Mar. 1, 1992, at D1.

26. Jones Day agreed with Keating that it could "bill liberally" for legal services rendered to ACC/Lincoln Savings in exchange for making political contributions at Keating's direction. The firm vowed that its "good name" would be vindicated in a jury trial, but then paid \$23 million to settle investors' claims immediately after opening arguments to the jury were delivered by the defrauded investors' counsel. Alison L. Cowan, *Big Law and Auditing Firms To Pay Millions in S&L Suit*, N.Y. TIMES, Mar. 31, 1992, at 1; Gail D. Cox, *Just Why Did Jones Day Settle?*, NAT'L L.J., Apr. 13, 1992, at 1; James S. Granelli, *Law Firm's Memos Raise Issues in Keating Scandal*, L.A. TIMES, Mar. 8, 1992, at D1; Tim Smart, *Jones Day: Did It Do Its Duty In The Keating Affair?*, BUS. WK., May 4, 1992, at 120.

One year later, Jones Day paid an additional \$51 million to settle enforcement actions brought by the Office of Thrift Supervision (OTS) against it and William J. Schilling, one of its partners. In its 94-page notice of charges, the OTS charged that Jones Day committed a number of legal and regulatory violations during a 1986 regulatory compliance audit of Lincoln Savings, including aiding and abetting the thrift's management in an effort to create inaccurate and misleading loan files and corporate records, knowingly omitting material facts in connection with a major Lincoln Savings loan, and advising the thrift's directors to ratify regulatory violations. *Jones Day Settles OTS Enforcement Claims on Lincoln S&L, Will Pay RTC \$51 Million*, 60 Banking Rep. (BNA) 582 (Apr. 26, 1993).

jury awarded the plaintiff bondholders and stockholders RICO and securities fraud damages totaling \$3.3 billion, the second-largest civil jury verdict in American history.<sup>27</sup>

In assessing the causes and impact of our nation's recent savings and loan crisis—or, for that matter, in studying *any* fraudulent financial scheme—careful attention must be paid to the integral roles played by professionals, especially attorneys and accountants, who all too often consciously abandoned their professional ethics and joined the “chain of greed” that epitomized the thrifts’ criminal operations and eventual costly downfall.<sup>28</sup> The three accounting firms, Arthur Young & Co., Arthur Andersen & Co.,<sup>29</sup> and Touche Ross & Co., who were implicated in the \$2.5 billion collapse of Keating’s feudal kingdom and collectively paid \$103 million to settle defrauded investors’ claims, provide but one illustration of the abandonment of professional standards of ethical conduct.

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27. Milt Freudenheim, *Federal Jury Orders Keating to Pay Investors \$3.3 Billion*, N.Y. TIMES, July 11, 1992, at 33; Jerry Kammer, *Keating Judgment: \$3 Billion*, ARIZ. REPUBLIC, July 11, 1992, at A1; Arnold Rotstein, *Keating Jury Awards Investors \$3 Billion*, ARIZ. DAILY STAR, July 11, 1992, at A1; Rhonda Rundle, *Huge Judgment Against Keating, Others Viewed as Symbolic, Collection Unlikely*, WALL ST. J., July 13, 1992, at A4. In October 1992, after hearing post-trial motions and calculating RICO (and Arizona RICO) treble damages and prejudgment interest, United States District Judge Richard M. Bilby entered judgment against Keating and the remaining defendants. See *In re Am. Continental Corp./Lincoln Sav. & Loan Sec. Litig.*, No. 93-15131, 1994 U.S. App. LEXIS 13184, at \*8 (9th Cir. May 23, 1994) (judgment of \$1,003,638,825.38 affirmed against Conley D. Wolfswinkel, a strawman who engaged in sham real estate transactions with ACC/Lincoln, due to the “significant part [he played] in perpetrating the evil success of Keating’s evil empire”). The Ninth Circuit rejected Wolfswinkel’s argument that the Supreme Court’s decision in *Reves* sheltered him from RICO liability, stating, in pertinent part, that:

Wolfswinkel’s claim that he is not subject to RICO treble damages even though he was found to have been a RICO coconspirator is otiose. His citation to *Reves* . . . does not advance his cause. That case did not hold that someone who enters into a RICO conspiracy can avoid treble damages simply because he is not a part of management. It merely determined what was meant by operating or managing a RICO enterprise for the purpose of deciding whether there was any RICO liability at all.

*Id.* at \*9-\*10.

28. See Steve France, *Savings & Loan Lawyers*, 77 A.B.A. J. 52 (1991) (observing that important roles were played by attorneys who aided and abetted, often approved and sometimes instigated thrift operators’ criminal wrongdoing and bogus transactions); James S. Granelli, *Keating’s Advisers Under Fire: Attorneys, Accountants Helped Massive Fraud Work, Investors’ Lawyers Say*, L.A. TIMES, Mar. 14, 1992, at D1; Byron Harris, *The S&L Looters Who May Get Away*, WALL ST. J., Feb. 12, 1990, at A14 (noting the essential roles played by lawyers who “papered” the bogus transactions by drawing up the contracts”); Charles McCoy, Richard B. Schmitt & Jeff Bailey, *Hall of Shame: Besides S&L Owners, Host of Professionals Paved Way in for Crisis*, WALL ST. J., Nov. 2, 1990, at A1. See also *ACC/Lincoln Savings*, 794 F. Supp. at 1441-47, 1449-54 (summarizing attorneys’ and accountants’ involvement in Keating’s fraudulent and criminal schemes).

29. Arthur Andersen received \$3.7 million for providing clean audit opinions to ACC/Lincoln Savings in 1984-1985. According to thrift regulators, it fraudulently backdated loan file data and “stuffed” files with loan documentation. James S. Granelli, *Keating Trial Focuses on Advisers*, L.A. TIMES, Mar. 14, 1992, at D1. Although it steadfastly denied wrongdoing, following plaintiffs’ counsel’s opening statement in the 1992 RICO/securities fraud class action trial, Arthur Andersen agreed to pay \$30 million to settle claims asserted by stockholders and bondholders. Earlier, it had agreed to pay from \$6 million to \$25 million—the exact amount to be determined by arbitration—to settle claims brought by the RTC. David J. Jefferson & Lee Berton, *Accounting Firm to Settle Suit on Thrift*, WALL ST. J., Mar. 17, 1992, at A4.

Reduced to its essentials, the investors' allegations in the *ACC/Lincoln Savings* class action litigation were that the professional defendants consciously rendered, in exchange for exorbitant fees and expenses, ethically unjustifiable services that were integral to the illicit operation or management of the ACC/Lincoln Savings RICO enterprise. In turn, these professional services facilitated the sale of hundreds of millions of dollars of worthless junk bonds to thousands of elderly investors who were specifically targeted by Keating and his co-conspirators as "the weak, meek and ignorant." Moreover, investors alleged that the professionals were primary violators of RICO and the federal securities laws because they undertook various improper actions on Keating's and ACC/Lincoln's part, including Arthur Young's writing of advocacy letters to numerous United States Senators in a successful effort to convince several of them—the so-called "Keating Five"<sup>30</sup>—to intervene on Keating's behalf with federal regulators and prevent

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30. Five United States Senators, known as the "Keating Five," were given substantial campaign contributions at the same time that they intervened in federal regulators' investigation of Lincoln Savings and Keating. These senators were Sen. Dennis DeConcini (D-Ariz.), Sen. Alan Cranston (D-Cal.), Sen. Donald W. Riegle (D-Mich.), Sen. John H. Glenn (D-Ohio), and Sen. John McCain (R-Ariz.). *The Keating Five* (editorial), WALL ST. J., Oct. 16, 1989, at A14. Some of them intervened with regulators on Keating's behalf more than once. Andy Hall & Jerry Kammer, *DeConcini Aides Got Tied to Keating S&L Loans*, ARIZ. REPUBLIC, Sept. 14, 1989, at A1. Senator DeConcini was one of the principal sponsors of RICO "reform" legislation that would have directly benefited Keating. Andy Hall & Jerry Kammer, *DeConcini Bill May Offer Keating Help*, ARIZ. REPUBLIC, Sept. 15, 1989, at A1. Senator DeConcini initially told Arizona news people that the RICO Reform Act would not "affect government regulators or government cases." *Id.* He later conceded that it would. *Id.*, see also Jill Abramson & Christi Harlan, *RICO-Reform Bill Won't Be Retroactive*, WALL ST. J., Sept. 28, 1989, at B7. Whatever the five Senators intended, Keating frankly acknowledged that he sought to buy influence with the political contributions. Brooks Jackson, *New Disclosures of Riegle's Lincoln Role Suggest He Was More Than a Bystander*, WALL ST. J., Nov. 15, 1989, at A28 (stating that Keating "arranged \$1.4 million in political donations for the five senators"). Keating later said that "he hoped his money had induced elected officials to take up his case." Brooks Jackson, *FBI Probe Focuses on Senators' Ties to Keating's S&L*, WALL ST. J., Nov. 13, 1989, at A7. What Keating thought he had bought was as substantial as what he paid. In April 1987, the five Senators met with Edwin Gray, who at that time was head of the Federal Home Loan Bank Board (FHLBB). Sam Stanton, *House Orders Subpoenas in Keating Case*, ARIZ. REPUBLIC, Oct. 13, 1989, at A1. They convinced regulators to take steps to end a regulatory investigation of Lincoln. *Id.* Two of Senator DeConcini's top aides received more than \$50 million in real estate loans from Lincoln. Andy Hall & Jerry Kammer, *DeConcini Aides Got Keating S&L Loans*, ARIZ. REPUBLIC, Sept. 14, 1989, at A1. Senator McCain received \$112,000 in campaign contributions and \$13,433 in unreported airplane trips. Andy Hall & Jerry Kammer, *Kin's Deal, Trips Reveal Close McCain-Keating Tie*, ARIZ. REPUBLIC, Oct. 8, 1989, at A1. McCain's wife and father-in-law invested \$359,100 in a shopping center partnership with Keating. *Id.* Senator Cranston received more than \$850,000 in political contributions from Keating. Sam Stanton, *Ethics Review Urged of Keating, Senators*, ARIZ. REPUBLIC, Oct. 14, 1989, at A1. Senator Glenn received \$200,000 from Keating for a political committee controlled by the Senator, and \$39,000 in direct contributions, which probably violated federal election laws. *Id.*

Subsequently, when the regulators targeted the thrift for closer investigations, Keating used his political influence to get the Senators to cut off the investigation, requiring the regulators to start anew. Andy Hall & Jerry Kammer, *Lincoln's "Kamikaze Banking": Wallflower Thrift Become High Roller*, ARIZ. REPUBLIC, Sept. 16, 1989, at A2. That delay provided Keating and his friends an opportunity to further their frauds, sinking Lincoln into an even deeper pit. *Id.* In 1987, the five Senators then pressured the FHLBB to stop the investigation of Lincoln. *The Senate Five*, (editorial) N.Y. TIMES, Oct. 23, 1989, at A18. Following the recommendation by federal examiners that Lincoln be placed in receivership, M. Danny Wall, the newly appointed chairman of the Office of Thrift Supervision (formerly the FHLBB), transferred the case from the Federal Home Loan Bank in San Francisco to the FHLBB in Washington, D.C., where it sat for almost two years with no action. *Id.*

timely seizure of the thrift, as well as misrepresenting Lincoln's collapsing financial condition to regulators. The resulting two-year delay before regulators could seize Lincoln Savings, for which Arthur Young must be given much of the

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When William Robertson, chief of regulation and supervision at the San Francisco Federal Home Loan Bank's Office of Enforcement, recommended to Wall that Lincoln Savings be placed into receivership in 1987, Wall told Robertson that he would be replaced. Brooks Jackson, *Sleeping Watchdog: How Regulatory Error Led to Disaster at Lincoln Savings*, WALL ST. J., Nov. 20, 1989, at A12. Wall then stripped the San Francisco regulators of power to act over the case. *Id.*

One of the major concerns of the House Banking Committee investigating the Lincoln Savings failure and Wall's relation to it was why Wall did not heed the San Francisco regulators' warnings. Andy Hall & Jerry Kammer, *Lincoln's 'Kamikaze Banking': Wallflower Thrift Became High Roller*, ARIZ. REPUBLIC, Sept. 16, 1989, at A4. Representative Toby Roth stated, "I, for the life of me, can't see why you didn't listen to your people in San Francisco instead of Mr. Keating. When it comes to Mr. Keating, you seem to be rather wimpish." *Id.* The sentiment held by many of those present at the House hearings was reflected in the words of Representative Jim Leach, who said, "If the allegations the committee has heard so far are true, Charles Keating is a financial sociopath of obscene proportions—the Rev. Jim Bakker of American commerce—given license to steal by a bank board headed by the Neville Chamberlain of financial regulation, a cheerleader who saw little evil and thus spoke little truth." Nathaniel C. Nash, *Savings Executive Won't Testify and Blames Regulators for Woes*, N.Y. TIMES, Nov. 22, 1989, at B8.

Edwin Gray, the head of the FHLBB when the Lincoln Savings investigation began, commented on the intervention of the Senators; it is not necessary to agree with his observations to recognize their force:

Sen. DeConcini apparently knows no shame. Like former House Speaker Jim Wright, who resigned in shame, Sen. DeConcini continues to justify his actions to subvert the regulatory process—on behalf of Lincoln—as merely "doing [his] job" to "represent a constituent. . . against rogue bureaucratic regulators."

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... [A]lmost 29 months ago, senior thrift regulators warned Sen. DeConcini that he was intervening on behalf of an S&L which was "a ticking time bomb." Nevertheless, he continued to intervene for, and serve as an apologist for, Lincoln Savings management. Having hitched himself to the Lincoln Savings wagon in return for substantial political contributions, Sen. DeConcini found it impossible to free himself, even as Lincoln plunged over the precipice and into the abyss. Once bought, he stayed bought.

Lincoln's Charles H. Keating, Jr. has not been shy about his own intentions. Asked whether his very substantial political contributions to DeConcini and other political figures "in any way influenced [them] to take up [his] cause." Keating replied: "I want to say in the most forceful way I can, I certainly hope so." Certainly, Keating's hopes were answered by DeConcini.

Edwin Gray, *Regulator Rebuts DeConcini*, ARIZ. REPUBLIC, Sept. 3, 1989, at C1. The fraud at Lincoln Savings was believed to be linked to the fraud at Drexel Burnham Lambert. Catherine Yang, *The Lincoln Scandal May Lead to Drexel's Door*, BUS. WK., Jan. 15, 1990, at 26, 27 (reporting that the government was tracing ties between Keating and Milken, and noting SEC Chairman Richard C. Breeden's comment that if companies report profits on transactions that are not at "arm's length" and are "arranged" by buyers and sellers, "that is financial fraud").

The remarkable aspect of the thrift crisis is that the political fall-out was so small. See David E. Rosenbaum, *S&L's: Big Money, Little Outcry*, N.Y. TIMES, Mar. 18, 1990, at D1. This commentator stated:

Before the decade is out, the Federal bailout of the savings and loan industry is expected to cost the Government more than \$200 billion. That is much more than the Government will spend on such critical social programs as preschool education, drug control and aid to the homeless. It is more than will be spent on highways, air traffic control and pollution abatement. It amounts to more than \$1,300 for every American taxpayer, and it will not enhance national security, promote economic growth or improve public welfare one bit.

It is, by any measure, the biggest debacle in public finance in the United States since the Great Depression. One way or another, the public will pick up the tab, in the form of higher taxes or

blame, cost the taxpayers at least \$1 billion.<sup>31</sup> In essence, certified public accountants ignored the importance of their auditing function,<sup>32</sup> as well as their indisputable roles as public watchdogs,<sup>33</sup> when they prostituted themselves for errant thrift operators.<sup>34</sup>

United States District Judge Stanley Sporkin, who tried an aspect of the litigation relating to the catastrophic failure of Keating's Lincoln Savings, highlighted the role played by professionals who instigated or aided and abetted the fraudulent operation of numerous now-failed thrift institutions:

There are other unanswered questions presented by this case. Keating

reduced spending for other programs. A natural question is, why has it not become one of the biggest political scandals as well?

To be sure, some elements of scandal are there. Lies, greed, graft, negligence, back-room deals and outright corruption were behind a huge raid on the public till. Powerful politicians and tycoons were largely responsible.

But it has not become a scandal like Watergate or Teapot Dome in part because too many politicians have had their hands soiled by the savings and loan mess. So many are to blame that few are left to blame them.

*Id.*

31. Andy Hall & Jerry Kammer, *Lincoln's "Kamikaze Banking": Wallflower Thrift Became High Roller*, ARIZ. REPUBLIC, Sept. 16, 1989, at A2; Brooks Jackson, *FBI Probe Focuses on Senators' Ties to Keating's S&L*, WALL ST. J., Nov. 13, 1989, at A7; Brooks Jackson, *New Disclosures of Riegle's Lincoln Role Suggest He Was More Than a Bystander*, WALL ST. J., Nov. 15, 1989, at A28; Sam Stanton, *House Orders Subpoenas in Keating Case*, ARIZ. REPUBLIC, Oct. 13, 1989, at A1; *The Senate Five*, (editorial) N.Y. TIMES, Oct. 23, 1989, at A18.

32. For an extensive discussion of the evolution of the accounting profession, the importance of the audit function, and the reasons why accountants must be held liable in fraud and negligence to third parties, including corporate stockholders and creditors, see *H. Rosenblum, Inc. v. Adler*, 461 A.2d 138, 147-53 (N.J. 1983).

33. As *ACC/Lincoln* and the savings and loan scandal illustrate, the public accounting firms persistently ignored the Supreme Court's explicit recognition of the accounting profession's "public watchdog" role. *United States v. Arthur Young & Co.*, 465 U.S. 805, 817-18 (1984). Foreshadowing Arthur Young's improper role as an *advocate* for Keating and *ACC/Lincoln*, the Supreme Court stated, "[I]f investors were to view the auditor as an *advocate* for the corporate client, the value of the audit function itself might well be lost." *Id.* at 819 n.15 (emphasis added) (citing A. ARENS & J. LOEBBECKE, *AUDITING: AN INTEGRATED APPROACH* 55-58 (1976)).

34. Running through the savings and loan crisis and other financial scandals is the general problem of fraudulent financial reporting. When such aberrant behavior occurs, widespread consequences result, sometimes causing a devastating ripple effect. See REPORT OF THE NAT'L COMM'N ON FRAUDULENT FINANCIAL REPORTING 4 (1987). The General Accounting Office (GAO) was sharply critical of the accounting profession for its utter failure to uncover the widespread fraud in failing financial institutions:

We concluded that for 6 of the 11 S&Ls, CPA's did not adequately audit and/or report the S&Ls' financial or internal control problems in accordance with professional standards. The CPAs' problems involved (1) inadequate audit work in evaluating loan collectibility and (2) inadequate reporting on S&Ls' accounting practices, regulatory compliance, and internal controls. The nature of the audit and reporting problems was significant enough to warrant our referring the CPA firms performing the audits to regulatory and professional bodies for their review. The latest audit reports for the 11 S&Ls before they failed showed combined positive net worth totaling approximately \$44 million. At the time of the S&Ls' failures, which ranged from 5 to 17 months after the date of the last audit reports, the 11 S&Ls had combined negative net worth totaling approximately \$1.5 billion.

GAO, CPA AUDIT QUALITY: FAILURES OF CPA AUDITS TO IDENTIFY AND REPORT SIGNIFICANT SAVINGS AND LOAN PROBLEMS 1 (1989); see also Leslie Wayne, *Where Were the Accountants?*, N.Y. TIMES, Mar. 12, 1989, at C1 (detailing accounting firms' liability for the thrift crisis).

testified that he was so bent on doing the "right thing" that he surrounded himself with literally scores of accountants and lawyers to make sure all the transactions were legal. The questions that must be asked are:

Where were these professionals, a number of whom are now asserting their rights under the Fifth Amendment, when these clearly improper transactions were being consummated?

Why didn't any of them speak up or disassociate themselves from the transactions?

Where also were the outside accountants and attorneys when these transactions were effectuated?

What is difficult to understand is that with all the professional talent involved (both accounting and legal), why at least one professional would not have blown the whistle to stop the overreaching that took place in this case.<sup>35</sup>

Although controversial when written, Judge Sporkin's words ring true when the systemic wrongdoing that characterized the savings and loan scandal is considered and the integral involvement of professionals—especially attorneys and accountants—in Keating's fraudulent and criminal scheme is carefully examined. Defrauded investors seeking to recover catastrophic losses sustained when the thrift/holding company, often the RICO enterprise, went bankrupt and was seized by federal regulators were forced to sue errant professionals to recover the loss of their life's savings. In such schemes involving professional malfeasance and fraudulent misbehavior, a crucial legal tool can be a treble damage civil RICO action alleging that the defendant professionals violated § 1962(c) and (d) by participating directly in the conduct of an enterprise's affairs through a pattern of

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35. *Lincoln Sav. & Loan Ass'n v. Wall*, 743 F. Supp. 901, 919-20 (D.D.C. 1990) (footnote omitted). One commentary suggests that the Supreme Court's decision in *Reves* "may have the unintended effect of spurring efforts in Congress to impose new statutory duties on accountants to 'blow the whistle' on clients that auditors suspect may have engaged in illegal acts." Pitt & Johnson, *supra* note 20, at 33 (footnote omitted). Introduced in January 1993, H.R. 574, 103d Cong., 1st Sess. (1993), sought to codify certain audit requirements relating to detecting problems during the audit process. These audit requirements already are generally accepted auditing standards (GAAS), but codifying them would have directly provided the SEC with the full panoply of remedies for use in their enforcement. In a marked departure from existing auditing standards, however, the bill also required an auditor who, during an audit, detects or becomes aware that an illegal act did occur or may be occurring, to investigate further, to report any detected illegal act to management, and to assure itself that a securities issuer's board of directors is informed adequately of that act. The bill also required the auditor to make a report regarding the detected illegal act directly to the issuer's board of directors under certain circumstances, and if the board failed to notify the SEC of the auditor's report within one business day, the bill required the auditor to report directly to the Commission. Finally, the bill proposed that private actions could be not filed against the auditor for any finding, conclusion, or statement expressed in any reports of illegalities made to the SEC.

On March 18, 1993, the House of Representatives Telecommunications and Finance Subcommittee approved the bill by a voice vote after it was endorsed by the American Institute of Certified Public Accountants (AICPA) following the striking of an accord on legislative language providing that the private sector would possess principal responsibility for setting accounting standards but that the SEC would be able to intervene and modify those standards when such action was in the public interest. See *House Backs Bill to Make Auditors Fraud Watchdogs*, WALL ST. J., Mar. 19, 1993, at A4.

rackeering activity, acting as an accessory before the fact to it, aiding or abetting it, or conspiring to engage in it. Ultimately, the Ninth Circuit vindicated the plaintiffs' strategy in the *ACC/Lincoln Savings* class action litigation when it affirmed the jury's multi-billion dollar verdict.<sup>36</sup>

The responsibility of various professionals for the bank and savings and loan crisis that caused this generation to mortgage a substantial portion of its—and possibly the next two generations'—economic future<sup>37</sup> can hardly be underestimated.<sup>38</sup> Nevertheless, members of the accounting and legal professions—with

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36. See *In re Am. Continental Corp./Lincoln Sav. & Loan Sec. Litig.*, No. 93-15131, 1994 U.S. App. LEXIS 13184 (9th Cir. May 23, 1994).

37. To deal with the savings and loan crisis, Congress enacted special legislation, estimated to cost as much as \$500 billion over 30 years, to rescue more than 350 troubled thrifts. See Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 1983 (1989) (FIRREA) (amending scattered sections of Title 12 of the United States Code); Michael Quint, *New Estimate on Savings Bailout Says Cost Could Be \$500 Billion*, N.Y. TIMES, Apr. 7, 1990, at A1 (reporting GAO estimate over 30-year period); In fact, the ultimate cost of the savings and loan debacle and necessary bailout probably cannot presently be estimated. Stephen Labaton, *New Finance Woes: F.D.I.C. Loss Worse; S&L Crisis Deeper*, N.Y. TIMES, June 11, 1991, at A1. See generally, Nathaniel C. Nash, *Policy Shift on Bailouts Is Explored*, N.Y. TIMES, Feb. 1, 1990, at D1 (reporting that regulators warn that number of failed institutions will exceed 600, and may go as high as 800, with assets approaching \$500 billion); Nathaniel C. Nash, *U.S. Has Trouble Coping with Its Savings Empire*, N.Y. TIMES, Mar. 13, 1990, at A1 (reporting 1,991 "healthy" institutions with \$639 billion in assets, 400 "sick" institutions with \$360 billion in assets, 157 "insolvent" institutions with \$113 billion in assets, and 393 "seized" institutions with \$193 billion in assets).

The degree to which fraud contributed to the debacle, as well as the extent of the losses, is in dispute. Congressional and other studies put the figure high. H.R. REP. NO. 100-1088, at 2-13 (1988) (stating that criminal misconduct by insiders was a major contributing factor in approximately one-third of all commercial bank failures and three-fourths of all thrift failures and estimating loss at \$31 to \$80 billion); OFFICE OF COMPTROLLER OF THE CURRENCY, *BANK FAILURE: AN EVALUATION OF THE FACTORS CONTRIBUTING TO THE FAILURE OF NATIONAL BANKS* 9 (1988) (finding that insider abuse was a significant factor in 35 percent of bank failures). On a present value basis, the loss may be lower: \$150-175 billion. See NATIONAL COMM'N ON FINANCIAL INSTITUTION REFORM, *RECOVERY AND ENFORCEMENT, ORIGINS AND CAUSE OF THE S & L DEBACLE: A BLUEPRINT FOR REFORM* 4 (1993). The Commission concluded, too, that fraud was not the principal cause of the debacle; it was:

a consequence of the perverse incentives, permissive regulation, and inadequate supervision that had been built into the system. While most S & L operators did not succumb to the temptation, the ability to use insured deposits for risky investment was too tempting for some. The profit potentials produced imprudent risktaking, abusive practices, and fraud. There was a continuum of abusive practices running from aggressive pursuit of profit, and search for regulatory loopholes, to out-and-out fraud. Abusive practices of one form or another, mainly by S & L managers and owners but also by *unscrupulous attorneys, accountants, appraisers, and investment bankers*, figured in substantial taxpayer losses.

*Id.* at 8 (emphasis added). While the Commission concluded that fraud only accounted for 10-15 percent of the losses sustained in the debacle, it found nonetheless that such fraud was "unprecedented" and "repugnan[t]." *Id.* For more recent estimates, see U.S.G.A.O., *Financial Audit, Resolution Trust Corporation's 1995 and 1994 Financial Statements*, July 1996, at 9 ("RTC estimated that the total cost for resolving the 747 failed institutions was \$87.9 billion").

The savings and loan debacle affects the workload of the federal courts. See ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1992 ANNUAL REPORT OF THE DIRECTOR 66 (noting a 7 percent increase—from 1,359 to 1,448—in the number of cases dealing with lending institution fraud). See generally *id.* at 69-71.

38. In a recent decision enforcing a subpoena issued by the Office of Thrift Supervision (OTS), which sought to compel Ernst & Young (successor to Arthur Young & Co.) to turn over documents relating to its audit and

assistance from political figures—continue to seek to eviscerate RICO and shield themselves from the well-deserved potential liability they face for their roles in this crisis and other multi-million dollar fraudulent schemes.<sup>39</sup> The Supreme Court's decision in *Reves* provides a fairly typical example of professionals' conscious involvement in a fraudulent scheme and RICO's possible applicability to provide defrauded investors with a much-needed remedy. Its implementation in the lower courts, too, is offering those who defend professional liability issues a much-welcome opportunity to enlist the judiciary in the legal effort to rewrite the federal law of fraud to reflect the special pleading of those who should be held to higher (not lower) standards of responsibility.

### III. THE SUPREME COURT'S DECISION IN *REVES V. ERNST & YOUNG*

#### A. *The Eighth Circuit's Decision*

In *Reves*, the alleged RICO enterprise was the Farmer's Cooperative of Arkansas and Oklahoma, Inc. ("Co-op"), an agricultural cooperative that sold high-interest, but uninsured, promissory notes to raise money for its operating expenses. In 1980, the Co-op acquired the White Flame gasohol plant ("White Flame") from its general manager of 28 years, Jack White ("White"). That sale

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accounting work on behalf of 23 troubled or failed thrift institutions, Judge Lamberth wrote, "[A]ccounting firms may have been responsible for many of the abuses which have led to this country's savings and loan crisis," noting that the OTS had advised the court that "approximately one-third of the 690 financial institutions that have failed were audited by Ernst & Young or its predecessor" (Arthur Young). Director of Office of Thrift Supervision v. Ernst & Young, 786 F. Supp. 46, 52 (D.D.C. 1992). The losses caused by just four of the 23 institutions OTS was then investigating—Lincoln Savings, Silverado Savings, Vernon Savings, and Western Savings—were estimated at over \$5.5 billion. *Id.*, see also Lee Burton, *Spotlight on Arthur Young Is Likely to Intensify as Lincoln Hearings Resume*, WALL ST. J., Nov. 21, 1989, at A20 (detailing accounting firm's responsibility for the \$1.1 billion failure of Vernon Savings and the \$1 billion failure of Western Savings).

39. In assessing the causes of the bank and thrift crisis, careful attention must be paid to critical roles played by professionals—attorneys, accountants, loan brokers, investment bankers, and real estate appraisers—who abandoned their professional ethics. One financial reporter explained that:

[C]rimes in thrifts . . . often required the cooperation of groups of people, in what might be called a 'chain of greed.' . . . [T]he chains included five kinds of professionals, in addition to the borrowers who benefitted from the questionable loans. At the beginning of a transaction, *real estate brokers* masterminded the shady deals. Crooked *appraisers* then inflated real estate values to make the deals work. Inside the institutions, an array of *employees* from loan officers hungry for a loan commission to the executives themselves participated in the fraud. At the conclusion of a deal, *lawyers* "papered" the bogus transactions by drawing up the contracts, and *accountants* either looked the other way or neglected to scour the institutions' books too carefully.

Byron Harris, *The S&L Looters Who May Get Away*, WALL ST. J., Feb. 12, 1990, at A12 (emphasis in original); see also France, *supra* note 28 (observing that critical roles were often played by attorneys who aided and abetted thrift institutions' criminal wrongdoing). See generally J. ADAMS, *THE BIG FIX: INSIDE THE S & L SCANDAL: HOW AN UNHOLY ALLIANCE OF POLITICS AND MONEY DESTROYED AMERICA'S BANKING SYSTEM* (1990); E. KANE, *THE S & L INSURANCE MESS: HOW DID IT HAPPEN?* (The Urban Institute Press, 1989); J. O'SHEA, *THE DAISY CHAIN: THE TALE OF BIG BAG DON DIXON AND THE LOOTING OF A TEXAS S & L* (Pocket Books 1991); PAUL Z. PILZER & ROBERT DEITZ, *OTHER PEOPLE'S MONEY: THE INSIDE STORY OF THE S & L MESS* (1989); S. PIZZO, M. FRICKER, & P. MUOLO, *INSIDE JOB: THE LOOTING OF AMERICA'S SAVINGS AND LOANS* (1989).



occurred as a result of a November 1980 board of directors meeting at which White convinced the Co-op to purchase White Flame. Subsequently, White obtained a declaratory judgment in an Arkansas state court that the sale actually occurred on February 15, 1980—nine months earlier—relieving him of his debts. In exchange for White Flame, the Co-op agreed to assume some \$4 million in White's personal guarantees for construction and operation of the plant.<sup>40</sup>

The Co-op retained Russell Brown and Company ("Russell Brown"), an Arkansas accounting firm, to perform its 1981 financial audit, which was assigned to audit partner Joe Drozal. One year later, Russell Brown merged with Arthur Young.<sup>41</sup> Drozal concluded that the value of the White Flame plant at the end of 1981 was approximately \$4.5 million. For accounting purposes, this was the value of the plant since the beginning of its construction in 1979; however, because the plant was purchased by White, its value for accounting purposes was its fair market value at the time of purchase, somewhere between \$440,000 and \$1.5 million—a valuation that left the Co-op insolvent. To avoid this result, Drozal determined in his audit that the Co-op owned White Flame from the start and thus valued the plant at \$4.5 million.<sup>42</sup>

Arthur Young presented its 1981 audit report to the Co-op's board of directors in April 1982. That report expressed doubt that the White Flame investment could be recovered and noted that the plant was losing \$100,000 each month. No mention was made by Arthur Young that its otherwise positive financial report was based on the improper determination that the Co-op always owned White Flame. At the Co-op's annual meeting in 1992, Arthur Young furnished even more misleading, but condensed, financial statements that failed to mention either the plant's operating losses or Arthur Young's negative prognosis for recouping the Co-op's White Flame investment. The identical scenario was essentially repeated for the Co-op's 1982 audit report, which was delivered at its board meeting and annual meeting in March 1983. Once again, as a result of Arthur Young's audit, noteholders were led to believe that the value of White Flame was \$4.5 million.<sup>43</sup>

After a run on its demand notes occurred in February 1984, the Co-op was unable to find financing and it filed for bankruptcy. Subsequently, its trustee-in-bankruptcy and a class of investors, purchasers of Co-op notes between February 1980 and February 1984, filed suit against Arthur Young as well as others associated with the Co-op. In their complaints, the trustee and the class representa-

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40. *Arthur Young & Co. v. Reves*, 937 F.2d 1310, 1315 (8th Cir. 1991) [hereinafter *Reves I*]; *Reves v. Ernst & Young*, 507 U.S. 170, 173 (1993) [hereinafter *Reves II*]. The sale and its subsequent back-dating occurred even though both White and Gene Kuykendall, the accountant for both the Co-op and White Flame, were indicted on federal tax fraud charges in September 1980. They were convicted in January 1981, despite the supportive trial testimony of Harry Erwin, managing partner of Russell Brown and Company, an Arkansas accounting firm retained by the Co-op. *Reves I*, 937 F.2d at 1316; *Reves II*, 507 U.S. at 173.

41. *Reves I*, 937 F.2d at 1315-16; *Reves II*, 507 U.S. at 173.

42. *Reves I*, 937 F.2d at 1316-17; *Reves II*, 507 U.S. at 173-74.

43. *Reves I*, 937 F.2d at 1316-20; *Reves II*, 507 U.S. at 174-75.

tive contended that Arthur Young materially misled the Co-op and its members by concealing the Co-op's true financial position, a violation of RICO. While allowing many of the plaintiffs' other claims to proceed to trial, the district court granted Arthur Young's motion for summary judgment as to the RICO claim.<sup>44</sup>

The Eighth Circuit affirmed the district court's grant of summary judgment because, even though the appellate court clearly believed that Arthur Young had "committed a number of reprehensible acts" during the course of its involvement with the RICO enterprise, and even though the jury had found it guilty of securities fraud, Arthur Young's association with the Co-op "did not rise to the level required for a RICO violation."<sup>45</sup> As Judge Frank Magill noted, under the Eighth Circuit's previous ruling in *Bennett v. Berg*,<sup>46</sup> "[a] defendant's participation must be in the conduct of the affairs of a RICO enterprise, which ordinarily will require some participation in the operation or management of the enterprise itself."<sup>47</sup> In contrast, Arthur Young's involvement with the Co-op was limited to "the audits, meetings with the Board of Directors to explain the audits, and presentations at the annual meetings," and that level of involvement did not, according to the court, satisfy the Eighth Circuit's "participation" in "operation or management" standard.<sup>48</sup>

While the investors contended that the Eighth Circuit should apply the less restrictive test followed by the Eleventh Circuit,<sup>49</sup> Judge Magill declined the

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44. *Reves I*, 937 F.2d at 1320-24; *Reves II*, 507 U.S. at 175-76. In granting summary judgment as to the RICO claim, the district court stated:

Plaintiffs have failed to show anything more than that the accountants reviewed a series of completed transactions, and certified the Co-Op's records as fairly portraying its financial status as of a date three or four months preceding the meetings of the directors and the shareholders at which they presented their reports. We do not hesitate to declare that such activities fail to satisfy the degree of management required by [the Eighth Circuit in] *Bennett v. Berg*.

*Reves II*, 507 U.S. at 176 (quoting *Robertson v. White*, Case No. 85-2044, slip op. (W.D. Ark. Oct. 15, 1986)).

45. *Reves I*, 937 F.2d at 1324.

46. 710 F.2d 1361, 1364 (8th Cir.) (en banc), cert. denied, 464 U.S. 1008 (1983).

47. *Reves I*, 937 F.2d at 1324 (quoting *Bennett*, 710 F.2d at 1364). Following the *Bennett* decision, district courts in the Eighth Circuit wrote only a handful of opinions construing or applying the *Bennett* test; they did not develop any special concepts to deal with the question of what "operation or management" means. See, e.g., *Ford Motor Co. v. B&H Supply, Inc.*, 646 F. Supp. 975, 999 (D. Minn. 1986) (corporations that were members of an "association in fact" enterprise were found to have participated in management of the enterprise); *Southgate Bank v. Public Water Supply Dist. No. 7*, 601 F. Supp. 262, 264 (E.D. Mo. 1984) (law firm and accounting firm found not to be involved in management of the enterprise, the Public Water Supply District). Several district courts outside the Eighth Circuit also followed *Bennett*, although it was not binding precedent as to them. These decisions also did not undertake to flesh out the *Bennett* court's "operation or management" test. See, e.g., *Lipin Enters., Inc. v. Lee*, 625 F. Supp. 1098, 1100 (N.D. Ill. 1985) (banks that allegedly misled buyer into purchasing overvalued stock of seriously indebted seller found not to have managed the "association in fact" enterprise consisting of banks and seller), *aff'd on other grounds*, 803 F.2d 322 (7th Cir. 1986); *United States v. Kaye*, 586 F. Supp. 1395, 1400 (N.D. Ill. 1984) (deputy sheriff who allegedly received bribes in return for influencing outcome of court cases found not to have managed court's affairs).

48. *Reves I*, 937 F.2d at 1324.

49. *Bank of Am. Nat'l Trust & Sav. Ass'n v. Touche Ross & Co.*, 782 F.2d 966, 970 (11th Cir. 1986) (management level participation in affairs of enterprise not required). The Eleventh Circuit's decision in *Bank of America* is discussed *infra* at notes 138-140 and accompanying text.

invitation, stating, "[w]e are aware of the inconsistencies between the circuits regarding the necessary level of participation for RICO liability." The Eighth Circuit panel in *Reves* was, he felt, bound to follow *Bennett* "until the Supreme Court rejects our standard or this court en banc overrules" that decision.<sup>50</sup>

## *B. The Supreme Court's Decision*

### *1. The Operation or Management Test*

Writing for the Supreme Court's majority, Justice Harry Blackmun initially noted that "[t]he narrow question in this case is the meaning of the phrase 'to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs.'" <sup>51</sup> Focusing on the appearance of the word "conduct" twice in § 1962(c), first as a verb ("to conduct") and then as a noun ("conduct"), Justice Blackmun observed that "it seems reasonable to give each use a similar construction." As a verb, he felt "conduct" means "to lead, run, manage, or direct."<sup>52</sup> He then observed that "unless one reads 'conduct' to include an element of direction when used as a noun in this phrase, the word becomes superfluous. Congress could easily have written 'participate, directly or indirectly, in [an] enterprise's affairs,' but it chose to repeat the word 'conduct'."<sup>53</sup> Thus, Justice Blackmun concluded, "in the context of the phrase 'to conduct . . . [an] enterprise's affairs,' the word indicates some degree of direction."<sup>54</sup>

Although he recognized that the term "participate" in § 1962(c) apparently possessed greater breadth than the word "conduct," Justice Blackmun found its limits in what the statute did *not* say:

On the one hand, "to participate . . . in the conduct of . . . affairs" must be broader than "to conduct affairs" or the "participate" phrase would be superfluous. On the other hand, as we already have noted, "to participate . . . in the conduct of . . . affairs" must be narrower than "to participate in affairs" or Congress' repetition of the word "conduct" would serve no purpose . . .

Once we understand the word "conduct" to require some degree of direction and the word "participate" to require some part in that direction, the meaning of Section 1962(c) comes into focus. In order to "participate, directly or indirectly, in the conduct of such enterprise's affairs," one must have some part

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50. *Reves I*, 937 F.2d at 1324. The majority rule followed in the circuits is that panels may not depart from prior decisions unless *en banc* hearings are granted or the opinion is, at the least, circulated to the entire court. *See, e.g., Schiffels v. Kemper Fin. Servs., Inc.*, 978 F.2d 344, 351 n.2 (7th Cir. 1992); *Adamson v. Lewis*, 955 F.2d 614, 620 (9th Cir.), *cert. denied*, 112 S. Ct. 3015 (1992). The cases are collected in Alan R. Gilbert, Annotation, *In Banc Proceedings In Federal Courts of Appeal*, 37 A.L.R. FED. 274, § 5 (1978); *see also infra* APPENDIX B ("DEFRAUD").

51. *Reves II*, 507 U.S. at 177 (quoting 18 U.S.C. § 1962(c)).

52. *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 474 (1976)).

53. *Id.* at 178; *see also infra* note 922 (discussing different language in state RICO statutes).

54. *Id.* (footnote omitted).

in directing those affairs.<sup>55</sup>

The Court then held that “the ‘operation or management’ test expresses this requirement in a formulation that is easy to apply.”<sup>56</sup> The Court did not, however, undertake the additional step of giving a positive or concrete meaning to the concept of “operate or manage.” Instead, the Court gave seven examples of what it did *not* mean.

## 2. Seven Negative Propositions

Seven aspects of the *Reves* opinion point to what the Court did *not* mean by the “operation or management” test it adopted. First, the Court did *not* accept the argument that “‘participate’ [is used] as a synonym for ‘aid and abet,’ ” *in the affairs of the enterprise*.<sup>57</sup> Such aiding and abetting would encompass nearly any act of assistance or support to the affairs of the enterprise; it would not be limited to aiding or abetting the *management* or *operation* of the affairs of the enterprise. The Court felt that this interpretation of the phrase was too broad; it stated, “Congress chose a middle ground, consistent with a common understanding of the word ‘participate’—‘to take part in.’ ”<sup>58</sup> Thus, to be involved in the “operation or management” of the enterprise is not to merely support or encourage, that is, aid and abet, the affairs of the enterprise, but requires some participation in the operation or management of its affairs.

Second, the Court held that “liability is *not* limited to those with primary responsibility for the enterprise’s affairs,”<sup>59</sup> summarily overruling the “significant control” test applied by the District of Columbia Circuit.<sup>60</sup> The Supreme Court rejected the District of Columbia Circuit’s interpretation as presenting too restrictive a reading of § 1962(c). Justice Blackmun stated, “[T]he word ‘participate’ makes clear that RICO liability is not limited to those with primary responsibility for the enterprise’s affairs, just as the phrase ‘directly or indirectly’ makes clear

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55. *Id.* at 179.

56. *Id.* The Court found support in RICO’s legislative history for the view that Congress intended that § 1962(c) reach only the operation or management of an enterprise through racketeering activity. Justice Blackman cited the scholarship of one of our number (Blakey) to support the majority’s view. *Id.* at 180 (citing Blakey & Gettings, *supra* note 3; Blakey, *supra* note 3.) Justice Blackmun also rejected the argument that RICO’s “liberal construction” clause mandated a broad reading of the “conduct or participate . . . in the conduct of” language. *Id.* at 183. He noted, “This clause obviously seeks to ensure that Congress’ intent is not frustrated by an overly narrow reading of the statute, but it is not an invitation to apply RICO to new purposes that Congress never intended.” *Id.*; see also *supra* note 7 (discussing “liberal construction”).

57. *Reves II*, 507 U.S. at 179.

58. *Id.* (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1646 (1976)).

59. *Id.* (emphasis added).

60. See *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 913 F.2d 948 (D.C. Cir. 1990) (emphasis added), *cert. denied*, 501 U.S. 1222 (1991). The circuit court held that “§ 1962(c) applies when a defendant, through a pattern of racketeering activity, exercises *significant* control over or within an enterprise.” *Id.* at 954 (emphasis added). The court of appeals continued, “[m]ost often the . . . requirement will be satisfied when a defendant either participates in directing the enterprise toward its preexisting goals or participates in exercising control over an enterprise so as to reset its goals.” *Id.*

that RICO liability is not limited to those with a formal position in the enterprise, but *some* part in directing the enterprise's affairs is required."<sup>61</sup> Thus, the Court specifically rejected the District of Columbia Circuit's suggestion that § 1962(c) "requires 'significant control over or within an enterprise.'"<sup>62</sup> Accordingly, one polar view—the "most restrictive"<sup>63</sup>—was rejected.

Third, the Court rejected the defrauded investors' contention that the "operation or management" test was flawed because liability under § 1962(c) should not be limited to upper management, but rather should extend to "any person employed by or associated with [the] enterprise." The Court held that just as the "operation or management" test is not limited to those with significant control over the enterprise, "liability under Section 1962(c) is *not* limited to upper management."<sup>64</sup> The Court pointed out that "[a]n enterprise is 'operated' not just by upper management but also by lower-rung participants in the enterprise who are under the direction of upper management."<sup>65</sup> An enterprise "also might be 'operated' or 'managed' by others 'associated with' the enterprise who exert control over it as, for example, by bribery."<sup>66</sup> Thus, the operate or manage test adopted by the *Reves* Court is not an "upper management only" rule.

Fourth, the Court did *not* decide whether "low-level employees could be considered to have participated in the conduct of an enterprise's affairs."<sup>67</sup> Thus, the question of the liability of low-level employees as "managers" was left undecided, that is, the Court did not decide at what level the line between managers and non-managers would be drawn.

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61. *Reves II*, 507 U.S. at 179 (footnote omitted).

62. *Id.* at n.4 (quoting *Yellow Bus*, 913 F.2d at 954).

63. The phrase is that of the District of Columbia Circuit in *Yellow Bus*, 913 F.2d at 952.

64. *Reves II*, 507 U.S. at 184 (emphasis added). If "conduct" within RICO were restricted to high level management, it might lead to a management *only* rule, a concern expressed in one of the amici briefs. See Brief of Amicus Curiae for the Trial Lawyers for Public Justice, *supra* note 23, at 25-26; see also *United States v. Herrera*, 23 F.3d 74, 75 n.2 (4th Cir. 1994) (prior to *Amen*, defendant was convicted of aiding and abetting criminal enterprise and filed motion to vacate sentence based on *Amen*; court denied motion under invited error doctrine); compare *United States v. Pino-Perez*, 870 F.2d 1230, 1237 (7th Cir.) (en banc) (principal in the second degree liability is possible under 21 U.S.C. § 848 (CCE or Drug Kingpin statute)), *cert. denied*, 493 U.S. 901 (1989), with *United States v. Amen*, 831 F.2d 373, 381-82 (2d Cir. 1987) (liability under § 848 is limited to principal in the first degree), *cert. denied*, 485 U.S. 1021 (1988); Adoption of a management only rule would substantially curtail RICO as an effective weapon against criminal groups. Unlike CCE, RICO's predicate offenses include state law offenses; thus, a failure to convict under RICO would result in a failure to convict at all. See *Ciupak*, *supra* note 3, at 394-95 (state prosecution may constitutionally follow federal prosecution under the Dual Sovereign Doctrine, but at least 18 states prohibit it by statute) (collecting cases)). In *Reves II*, the Supreme Court expressly held that RICO was not to be so hobbled, a fortunate result in light of RICO's successful use in a number of important areas. That history merits an extended treatment. See generally APPENDIX C (IMPLEMENTATION).

65. *Reves II*, 507 U.S. at 184.

66. *Id.* Thus, *Reves* indicated that criminal RICO prosecutions of "outsiders" who exercise influence over an enterprise should not be endangered by the "operation or management" test for § 1962(c) liability. See *United States v. Yonan*, 800 F.2d 164, 167-68 (7th Cir. 1986) (criminal defense attorney attempted to bribe prosecutor), *cert. denied*, 479 U.S. 1055 (1987).

67. *Reves II*, 507 U.S. at 184 n.9. The Court did not reach the question because the facts of the case did not warrant it. *Id.*

Fifth, Justice Blackmun analyzed the Government's argument, as amicus curiae for petitioners (the defrauded investors), that the "operation or management" test was inconsistent with § 1962(c) because it limited the liability of "outsiders" who have no official position within the enterprise. Justice Blackmun concluded that the argument failed on several counts. First, he noted, "it ignores the fact that Section 1962 has four subsections."<sup>68</sup> The Court explained that "infiltration of legitimate organizations by 'outsiders' is clearly addressed in subsections (a) and (b) [of § 1962], and the 'operation or management' test that applies under subsection (c) in no way limits the application of subsections (a) and (b) to 'outsiders.'"<sup>69</sup> Second, § 1962(c) "is limited to persons 'employed by or associated with' an enterprise, suggesting a more limited reach than subsections (a) and (b), which do not contain such a restriction."<sup>70</sup> Third, § 1962(c) "cannot be interpreted to reach complete 'outsiders' because liability depends on showing that the defendants conducted or participated in the conduct of the 'enterprise's affairs,' not just their *own* affairs."<sup>71</sup>

'Outsiders' may be liable under Section 1962(c) if they are 'associated with' an enterprise and participate in the conduct of *its* affairs—that is, participate in the operation or management of the enterprise itself—but it would be consistent with neither the language nor the legislative history of Section 1962(c) to interpret it as broadly as petitioners and the United States urge.<sup>72</sup>

Thus, outsiders will be directly liable when their interaction with the enterprise amounts to operation or management of the enterprise.

Sixth, the Court held that the concept of "operation or management" is *not* nearly so broad as the concept of "conducting" an illegal gambling enterprise under 18 U.S.C. § 1955(a).<sup>73</sup> Thus, the Court rejected the Fifth Circuit's analysis of "conduct" in *United States v. Martino*,<sup>74</sup> where the circuit court rejected the contention that § 1962(c) applied "only to those who manage the enterprise, *i.e.*, the top coterie."<sup>75</sup>

Seventh, the *Reves* Court held that the wrongful actions engaged in by Arthur

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68. *Id.* at 185 (referring to 18 U.S.C. § 1962(a)-(d)).

69. *Id.* At this point, the Court recognized that the fourth subsection—§ 1962(d)—made it "unlawful to conspire to violate any of the other three subsections." *Id.* at 185 n.10. Significantly, the Court did not further comment on the implication of the "operation or management" test for conspiracy liability. *See infra* note 385 *et. seq.* (discussing RICO conspiracy).

70. *Id.* at 185.

71. *Id.* (emphasis in original) (quoting 18 U.S.C. § 1962(c)).

72. *Id.*

73. Section 1955(a) applies to anyone who "conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business." 18 U.S.C. § 1955(a).

74. 648 F.2d 367 (5th Cir. 1981), *cert. denied*, 456 U.S. 949 (1982), *on remand*, 681 F.2d 952 (5th Cir. 1982), *aff'd on other grounds sub nom.*, *Russello v. United States*, 464 U.S. 16 (1983). *Martino* was a criminal RICO prosecution involving an association-in-fact enterprise formed for the purpose of purchasing properties and committing arson fraud. 648 F.2d at 380.

75. *Id.* at 382.

Young were *not* the “operation or management” of the alleged enterprise—the Co-op—for purposes of § 1962(c). The Court concluded that the accounting firm could not be held liable under RICO:

[W]e only could conclude that Arthur Young participated in the operation or management of the Co-Op itself *if Arthur Young’s failure to tell the Co-Op’s board that the plant should have been given its fair market value constituted such participation.* We think that Arthur Young’s failure in this respect is not sufficient to give rise to liability under Section 1962(c).<sup>76</sup>

Thus, when an accounting firm merely fails to tell the directors of a corporation of decisions it made regarding the valuation of the company’s assets, it does not engage in the “operation or management” of the corporation’s affairs.

### 3. *The Reves Dissent*

Writing for himself and Justice Byron White, Justice David Souter dissented from the majority opinion in *Reves*. The dissenters found that RICO’s “liberal construction clause”<sup>77</sup> dictated a broader reading of the “conduct or participate . . . in the conduct” language of § 1962(c). Nonetheless, Justices Souter and White thought that, even embracing the majority’s narrow construction, Arthur Young’s participation rose to the level of involvement in the Co-op’s management thereby subjecting it to RICO liability.

Initially, Justice Souter questioned the majority’s insistence on the dictionary’s definition of “conduct” as a verb rather than as a noun. Used as a noun, he explained, it also meant “carrying forward” or “carrying out” and did *not* necessarily imply direction or control. This less demanding sense of “conduct” was supported by the text of § 1962(c) that reaches even those “merely ‘associated with’ ” an enterprise, who are barred from even indirect participation in the illicit conduct of an enterprise. Justice Souter concluded that “this contextual examination shows ‘conduct’ to have a long arm, unlimited by any requirement to prove that the activity includes an element of direction.”<sup>78</sup>

At a minimum, Justice Souter observed, such a contextual reading brought into question the majority’s conviction that Congress intended the restrictive interpretation that the majority adopted. Moreover, even if “we call it a tie on the contextual analysis,” the “tie-breaker” was RICO’s “liberal construction clause,” which compelled the Court “to recognize the more inclusive definition of the word ‘conduct,’ free of any restricting element of direction or control.”<sup>79</sup>

Even if the “operate or manage” test were to be applied, Justice Souter found

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76. *Reves II*, 507 U.S. at 186 (emphasis added).

77. See *supra* note 7 (discussing liberal and strict construction).

78. *Reves II*, 507 U.S. at 188 (Souter & White, JJ., dissenting).

79. *Id.* at 189 (footnote omitted).

the majority's conclusion regarding Arthur Young's putative liability unsupportable:

If Arthur Young had confined itself in this case to the role traditionally performed by an outside auditor, I could agree with the majority that Arthur Young took no part in the management or operation of the Co-op. But the record on summary judgment, viewed most favorably to *Reves*, shows that Arthur Young created the very financial statements it was hired, and purported, to audit. Most importantly, *Reves* adduced evidence that Arthur Young took on management responsibilities by deciding, in the first instance, what value to assign to the Co-op's most important fixed asset, the White Flame gasohol plant, and Arthur Young itself conceded below that the alleged activity went beyond traditional auditing.<sup>80</sup>

Relying on the American Institute of Certified Public Accountants Code of Professional Conduct, which provides that management is responsible for adopting sound accounting practices and maintaining an internal control structure consistent with management's assertions in financial statements, Justice Souter emphasized that "[t]he auditor's responsibility is to express an opinion on the financial statements."<sup>81</sup> In his view, those standards left "no doubt that an accountant can in no sense independently audit financial records when he has selected their substance himself."<sup>82</sup>

Here, Justice Souter wrote, the evidence on the accounting firm's motion for summary judgment "indicates that Arthur Young did indeed step out of its auditing shoes and into those of management, in creating the financial record on which the Co-op's solvency was erroneously predicated."<sup>83</sup> In contrast to the majority's assertion as "undisputed" fact that "Arthur Young relied upon existing Co-op records in preparing the 1981 and 1982 audit reports,"<sup>84</sup> Justice Souter observed that the district court "found that *Reves* had presented evidence sufficient to show that Arthur Young 'essentially invented' a cost figure for White Flame (after examining White Flame records created by Kuykendall)," and that the accounting firm "created the 'blatant fiction' that the Co-op had owned White Flame from its inception, despite overwhelming evidence to the contrary in the Co-op's records."<sup>85</sup> "By these actions," wrote Justice Souter, "Arthur Young took on management responsibilities, for it thereby made assertions about the fixed asset value of White Flame that were derived, not from information or any figure provided by the Co-op's management, but from its own financial analysis."<sup>86</sup>

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80. *Id.* at 189-90 (footnote omitted).

81. *Id.* at 190 (quoting 1 AICPA PROFESSIONAL STANDARDS, SAS No. 1, § 110.02 (CCH 1982)).

82. *Id.* at 191.

83. *Id.*

84. *Id.* at 186.

85. *Id.* at 193 n.5.

86. *Id.* at 194. Justice Souter's analysis did not convince the majority; however, it is convincing some state supreme courts. See *infra* note 935 *et. seq.* (discussing state RICO decisions).



#### 4. Conclusion

Far from constituting a safe-harbor under RICO, the Court's decision in *Reves* affirmatively emphasizes that professionals *may* be subject to RICO liability if they play at least "*some* part in directing the enterprise's affairs."<sup>87</sup> Thus, looking at the plain language of *Reves* itself, professionals who function from within the enterprise, or "outsiders" who become enmeshed in the operation or management of their clients' enterprise, for example, by serving on corporate boards of directors,<sup>88</sup> should not believe that they are immune from § 1962(c) liability. Moreover, nothing in the plain language of *Reves* precludes the use of theories of liability *not* addressed by the Court.

The *Reves* Court expressly recognized that professionals who "take part in" the "operation or management" of the enterprise's affairs by participating in the fraudulent scheme—for example, "outside" auditors or attorneys who, along with inside managers, engage in a pattern of racketeering activity—face § 1962(c) liability.<sup>89</sup> Under this analysis, the result in *ACC/Lincoln Savings* and similar cases ought not be viewed as disturbed by *Reves*.<sup>90</sup>

#### IV. THE BACKGROUND TO *REVES*

To appreciate what the Court decided—and did *not* decide—in *Reves*, an

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87. *Id.* at 179 (emphasis in original).

88. One recent commentary on *Reves* appropriately reemphasizes the legitimate dangers associated with professionals' service on clients' boards of directors if they violate the law:

[B]oth inside and outside professionals should have a heightened cognizance of the fact that, by taking on corporate roles, such as serving on a client's board of directors, in addition to their professional functions, they increase the likelihood that they will be deemed subject to RICO's tentacles. The *Reves* Court held that to "conduct" the affairs of an enterprise is to "direct" them. Persons titled as "directors," therefore, as well as persons performing similar functions (even if not similarly titled), are not likely to benefit from the largesse the Court's decision otherwise bestows on accounting and legal professionals. Many commentators have advised that attorneys and other professionals should not serve as directors on client boards—this latest clarification of the breadth of the spectrum of potential liability (perhaps to be deemed as clear as "damages if you are an attorney, treble damages plus attorneys' fees and costs if you are an attorney/director") brings that advice sharply into focus.

This does not mean that these professionals cannot continue to have an important role in the consideration of corporate policies. Attending board meetings, rendering legal or financial advice on various proposals, and even articulating views with respect to proposed courses of action, should not result in the imposition of RICO liability. Serving as a director, however, may well create that result.

Pitt & Johnson, *supra* note 20, at 33 (footnotes omitted).

89. See, e.g., *In re Crazy Eddie Sec. Litig.*, 812 F. Supp. 338, 346-55 (E.D.N.Y. 1993) (amended complaint alleging that Peat Marwick deliberately misled company's Audit Committee and securities underwriters in order to cover up a fraudulent scheme held sufficient to state § 1962(c) claim). Peat Marwick subsequently settled investors' claims for an undisclosed amount. Robert J. Brennan, *Crazy Eddie Case Draws Settlement Of Up To \$42 Million*, WALL ST. J., Mar. 30, 1993, at C10.

90. Post-*Reves* circuit and district court decisions are discussed *infra* PART VII.

examination of various approaches to outsiders' or professionals' § 1962(c) liability, reflected in the different circuit and district court decisions that led the Court to grant certiorari in *Reves*, is helpful because, as Justice Benjamin Cardozo observed, cases, like words, "have a color and a content that will vary with setting."<sup>91</sup>

#### A. *Pre-Reves Analysis of Section 1962(c)'s Application to Professionals*

Prior to *Reves*, professional defendants were typically sued because they fraudulently provided an enterprise with legal, accounting, or other services that permitted the insider defendants' criminal or fraudulent scheme or schemes to go forward. Two issues under RICO were usually presented:<sup>92</sup>

- (1) Were defendants "employed by or associated with" the RICO enterprise? and
- (2) Did they "conduct or participate, directly or indirectly, in the conduct of

91. *Hawks v. Hamill*, 288 U.S. 52, 57 (1933).

92. Before the courts reached these issues, they usually faced the "Organized Crime Myth." Blakey & Perry, *supra* note 3, at 860-68. Professionals' first attack on the application of RICO to their fraudulent activities was an effort to confine the statute to "organized crime." It failed. *See, e.g., Sedima S.R.P.L. v. Imrex Co.*, 473 U.S. 479, 495 (1985) (RICO applies to "any person"—not just mobsters"); *Schacht v. Brown*, 711 F.2d 1343, 1356-58 (7th Cir.), *cert. denied*, 464 U.S. 1002 (1983). While the "legislative history [of RICO] clearly demonstrates that . . . [it] was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots," *Russello v. United States*, 464 U.S. 16, 26 (1983), and its "major purpose . . . [was] to address the infiltration of legitimate business by organized crime," RICO was consciously designed by Congress to reach both "illegitimate" and "legitimate" enterprises. *United States v. Turkette*, 452 U.S. 576, 590-91 (1981). As the Supreme Court observed in *H.J., Inc. v. Northwestern Bell Tel. Co.*, "[the contention that RICO is limited to organized crime] finds no support in the Act's text, and is at odds with the tenor of its legislative history." 492 U.S. 229, 244 (1989). In fact, "courts and . . . commentators have persuasively and exhaustively explained why . . . [RICO] . . . [is not limited] to organized crime." *Owl Constr. Co. v. Ronald Adams Contractor, Inc.*, 727 F.2d 540, 542 (5th Cir.) (citing with approval Blakey, *supra* note 3), *cert. denied*, 469 U.S. 831 (1984). Congress drafted RICO "broadly enough to encompass a wide range of criminal activity." *H.J., Inc.*, 492 U.S. at 248. "[Legitimate businesses] enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences." *Sedima*, 473 U.S. at 499. Accordingly, RICO fits into the traditional pattern of federal legislation that is enacted as general reform; even though it is aimed at a specific target, it is not limited to that specific target. *See, e.g., Bell v. United States*, 462 U.S. 356, 358-62 (1983) (18 U.S.C. § 2113(b) (bank robbery)); *Perrin v. United States*, 444 U.S. 37, 46 (1979) (18 U.S.C. § 1952 (bribery)); *United States v. Culbert*, 435 U.S. 371, 373-74 (1978) (18 U.S.C. § 1951 (extortion)); *United States v. Fabrizio*, 385 U.S. 263, 265-67 (1966) (18 U.S.C. § 1953 (lottery tickets)); *Caminetti v. United States*, 242 U.S. 470, 485-90 (1917) (18 U.S.C. §§ 2421-24 (white slave traffic)). *See generally* Blakey & Caesar, *supra* note 3, at 529 n.13 (collecting other cases); *id.* at 568 n.189 (similar drafting of the Klu Klux Klan Act of 1871 and Sherman Antitrust Act of 1890); G. Robert Blakey, *Definition of Organized Crime in Statutes and Law Enforcement Administration*, in PRESIDENT'S COMM'N ON ORGANIZED CRIME: REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL—THE IMPACT: ORGANIZED CRIME TODAY 511-80 (1986). RICO, in short, addresses "enterprise criminality," which consists of "all types of organized criminal behavior '[ranging] from simple political corruption to sophisticated white-collar crime schemes to traditional Mafia-type endeavors.'" *United States v. Cauble*, 706 F.2d 1322, 1330 (5th Cir. 1983) (quoting Blakey & Gettings, *supra* note 3, at 1013-14), *cert. denied*, 465 U.S. 1005 (1984). That RICO is somehow illegitimate if applied beyond organized crime remains, nevertheless, one of the more enduring of RICO's many myths. *See* Blakey & Perry, *supra* note 3, at 867 ("legally, at least, the organized crime myth ought to be left in its coffin with a stake driven through its heart").

such enterprise's affairs through a pattern of racketeering activity" in violation of § 1962(c)?<sup>93</sup>

### 1. *Employment or Association*

Section 1962(c)'s disjunctive construction makes unlawful the direct *or* indirect conduct of *or* participation in the conduct of an enterprise's affairs by *any* person employed by *or* associated with the enterprise.<sup>94</sup> Before *Reves*, courts recognized that proof of *either* the defendant's employment by *or* association with any enterprise would suffice on the first issue.<sup>95</sup> The broad statutory language employed by Congress in crafting RICO, including its "liberal construction clause,"<sup>96</sup> but in particular § 1962(c)'s text,<sup>97</sup> did *not* distinguish between so-called "insider" and "outsider" defendants in criminal *or* civil cases.<sup>98</sup> Instead, *any* person "associated with" the enterprise—not necessarily only those "employed by" the enterprise—who, directly or indirectly, participated in the "conduct" of its affairs through a pattern of racketeering activity risked violating the statute. Prior to

93. The separate issues of accessory before the fact, aiding and abetting, and conspiracy are considered *infra* PART IV, B through H. Similar issues arise under so-called "little RICO" statutes, many of which expressly provide private rights of action and contain provisions similar, if not identical, to § 1962(c). See generally Blakey & Perry, *supra* note 3, at 999-1011 (collecting and analyzing statutes). These general issues under state law are beyond the scope of this article. For a discussion of the operation or management issue under state law, see *infra* PART VII N.

94. 18 U.S.C. § 1962(c); *H.J., Inc.*, 492 U.S. at 232-33 ("RICO renders criminally and civilly liable 'any person' . . . who, being employed by or associated with . . . an enterprise, conducts or participates in the conduct of its affairs 'through a pattern of racketeering activity' ") (citation omitted); *Sedima*, 473 U.S. at 496 ("A violation of § 1962(c) . . . requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.") (footnote omitted). The courts reject claims that the "association" language of § 1962(c) facially violates the First Amendment. See, e.g., *United States v. Yarbrough*, 852 F.2d 1522, 1540-41 (9th Cir.), *cert. denied*, 488 U.S. 866 (1988).

95. See, e.g., *United States v. Mokol*, 957 F.2d 1410, 1417 (7th Cir.) ("Association does not require that the defendant be employed by or legitimately connected to the racketeering enterprise."), *cert. denied*, 506 U.S. 899 (1992); *United States v. Tille*, 729 F.2d 615, 620 (9th Cir.) (same), *cert. denied*, 469 U.S. 845 (1984); *United States v. Kaye*, 586 F. Supp. 1395, 1400 (N.D. Ill. 1984) (§ 1962(c) does *not* require proof that the defendant was employed by or associated with the enterprise *independent* of the racketeering activity).

96. See *supra* note 7 (discussing liberal and strict construction).

97. The House and Senate Reports accompanying RICO state that § 1962(c)'s prohibitions are without limitation or exception. S. REP. NO. 91-617 at 159 (1969) (§ 1962(c) applies to *any* "conduct of the enterprise through the prohibited pattern" and "there is no limitation on the prohibition"); H.R. REP. NO. 91-1549 at 4033 (1970) (same).

98. Prior to *Reves*, persons or entities "employed by" the RICO enterprise were often referred to as "insiders," while "outsiders" were most often held liable under § 1962(c)'s "associated with" language. See, e.g., *United States v. Garver*, 809 F.2d 1291, 1301 (7th Cir. 1987). RICO does not define the term "employed." Where a person is found to be "employed by" an enterprise, however, the person ordinarily receives salary, wages, fees, or other remuneration from the enterprise. See, e.g., *United States v. Forsythe*, 560 F.2d 1127, 1136 (3d Cir. 1977) (affirming § 1962(c) conviction of constables and magistrates who regularly solicited and received bribes from bail bond agency, holding that they might be viewed as agency's "employees" because, in essence, they were on its payroll); *Gramercy 222 Residents Corp. v. Gramercy Realty Assocs.*, 591 F. Supp. 1408, 1412 (S.D.N.Y. 1984) (upholding § 1962(c) claims against individual defendants who were partners in an architectural firm whose report was included in cooperative's selling prospectus).

*Reves*, the Fifth Circuit emphasized that § 1962(c) applied to “insiders *and outsiders*—those merely ‘associated with’ an enterprise—who participate directly *and indirectly* in the enterprise’s affairs through a pattern of racketeering activity . . . . [T]he RICO net is woven tightly to trap even the smallest fish, those peripherally involved with the enterprise.”<sup>99</sup>

## 2. *Conduct or Participate*

Prior to *Reves*, questions concerning the proper construction and application of § 1962(c)’s “conduct” and “participate” elements arose in a number of circuit and district court decisions involving RICO claims against accountants,<sup>100</sup> lawyers,<sup>101</sup> banks and investment bankers.<sup>102</sup> The lower courts adopted varying approaches to

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99. *United States v. Elliott*, 571 F.2d 880, 903 (5th Cir.) (emphasis in original) (citation omitted), *cert. denied*, 439 U.S. 953 (1978). *See also* *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union* 639, 913 F.2d 948, 954 (D.C. Cir. 1990) (“Section 1962(c) provides that participation may be indirect as well as direct, and nothing . . . precludes liability on the part of outsiders. The crucial question is not whether a person is an insider or an outsider.”) (citation omitted), *cert. denied*, 501 U.S. 1222 (1991).

100. *See, e.g., Akin v. Q-L Invs., Inc.*, 959 F.2d 521, 533-34 (5th Cir. 1992) (reversing entry of summary judgment in favor of accounting firm that prepared reports used in marketing partnership investments); *Bank of Am. Nat’l Trust & Sav. Ass’n v. Touche Ross & Co.*, 782 F.2d 966, 970 (11th Cir. 1986) (reversing dismissal of claim against accounting firm that prepared false audited financial statements which were submitted to lender); *Schacht*, 711 F.2d at 1345, 1353 (accounting firms that audited enterprise and failed to disclose its insolvency fell within “conduct” requirement); *Gilmore v. Berg*, 761 F. Supp. 358, 363, 375 (D.N.J. 1991) (accountant’s preparation of forecast letter, which involved one meeting with the client’s principal, several hours performing computation and receipt of compensation totaling \$3,000 held to be “sufficient evidence to let the jury decide” whether the “conduct” requirement had been met); *Ahern v. Gaussoin*, 611 F. Supp. 1465, 1494 (D. Or. 1985) (assistance in SEC registration, preparation of financial statements and quarterly aging reports and single speech at corporation’s annual meeting held sufficient to raise issue of fact as to whether independent auditor was “substantially connected” to client); *In re Federal Bank & Trust Co.*, [1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶91,565, at 98,879-80 (D. Or. 1984) (same). Nevertheless, in another line of pre-*Reves* cases involving accountants, district judges in the Southern District of New York applied a questionably stricter standard than other courts and dismissed many such claims. *See, e.g., Mekhjian v. Wollin*, 782 F. Supp. 881, 887 (S.D.N.Y. 1992) (“[I]n this District, courts have held that the ‘conduct or participate’ requirement is not satisfied where the fraud accusation against an accounting firm arises out of its performance of traditional accounting functions.”) (citing *Griffin v. McNiff*, 744 F. Supp. 1237, 1255 n.18 (S.D.N.Y. 1990), *aff’d*, 996 F.2d 303 (2d Cir. 1993)); *Goldman v. McMahan, Brafman, Morgan & Co.*, 706 F. Supp. 256, 261-62 (S.D.N.Y. 1989); *Plains/Anadarko-P Ltd. Partnership v. Coopers & Lybrand*, 658 F. Supp. 238, 240 (S.D.N.Y. 1987)).

101. *See, e.g., Blake v. Dierdorff*, 856 F.2d 1365, 1372 (9th Cir. 1988) (allegations that outside counsel owned stake in thrift institution, occupied a position of influence, accessed records that demonstrated institution’s true financial condition, and reviewed institution’s reports and releases to the public held sufficient to state § 1962(c) claim); *In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. 1424, 1464 (D. Ariz. 1992) (rejecting restrictive interpretation of § 1962(c) urged by accountants, attorneys and consultants who assisted Charles H. Keating, Jr., to carry out his fraudulent scheme; stating that “the plain wording of the statute states that participation in the conduct of an enterprise’s affairs is sufficient”); *Kline v. First W. Gov’t Sec.*, 794 F. Supp. 542, 556 (E.D. Pa. 1992) (law firm acting as securities seller’s general counsel was employed by or associated with seller/enterprise), *aff’d in part and rev’d in part*, 24 F.3d 480 (3d Cir. 1994); *Morin v. Trupin*, 747 F. Supp. 1051, 1066 (S.D.N.Y. 1990) (same); *Odesser v. Continental Bank*, 676 F. Supp. 1305, 1312 (E.D. Pa. 1987) (same).

102. *See, e.g., NCNB Nat’l Bank v. Tiller*, 814 F.2d 931, 936 (4th Cir. 1987) (lending institution); *Rodriguez v. Banco Cent.*, 777 F. Supp. 1043, 1054-55 (D.P.R. 1991) (investment banker), *aff’d*, 990 F.2d 7 (1st Cir. 1993).

the conduct or participate issue and often reached inconsistent results. For example, in *United States v. Scotto*,<sup>103</sup> the Second Circuit rejected the defendants' argument on appeal that the trial court erred in refusing to instruct the jury that it must find that their predicate acts " 'concerned or related to the operation or management of the enterprise' and '[a]ffected [its] affairs . . . in its essential functions.' "<sup>104</sup> Affirming the convictions, the Second Circuit fashioned RICO's "conduct" test in broad terms:

We think that one conducts the activities of an enterprise through a pattern of racketeering activity when (1) one is enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise, *or* (2) the predicate offenses are related to the activities of that enterprise. Simply committing predicate acts which are unrelated to the enterprise or one's position within it would be insufficient.<sup>105</sup>

The *Scotto* court clarified and emphasized the broad character of the test it adopted:

Section 1962(c) nowhere requires proof regarding the advancement of the union's affairs by the defendant's activities, or proof that the union itself is corrupt, or proof that the union authorized the defendant to do whatever acts form the basis for the charge. It requires only that the government establish that the defendant's acts were committed in the conduct of the union's affairs.<sup>106</sup>

Finally, the *Scotto* Court stated that "we do not think it necessary for a person to solidify or otherwise enhance his position in the enterprise through commission of the predicate violations."<sup>107</sup> The Second Circuit's formulation of the "conduct"

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103. 641 F.2d 47 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981). *Scotto* involved the receipt of illegal kickbacks by Anthony Scotto, president of Local 1814 of the International Longshoremen's Association (the RICO enterprise) and Anthony Anastasio, the Local's executive vice president. *See generally* Blakey, *supra* note 3, at 309-12 n.176 (detailed analysis of *Scotto* investigation and RICO prosecution).

104. *Scotto*, 641 F.2d at 54 n.3.

105. *Id.* at 54 (emphasis added).

106. *Id.* (quoting *United States v. Field*, 432 F. Supp. 55, 58 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1371 (2d Cir.), *cert. dismissed*, 439 U.S. 801 (1978)).

107. *Id.* Second Circuit decisions consistently followed *Scotto* in both criminal RICO cases, *see, e.g.*, *United States v. Minicone*, 960 F.2d 1099, 1107-08 (2d Cir.), *cert. denied*, 503 U.S. 950 (1992); *United States v. Simmons*, 923 F.2d 934, 951 (2d Cir.) (collecting cases), *cert. denied*, 500 U.S. 919 (1991); *United States v. Robilotto*, 828 F.2d 940, 947-48 (2d Cir. 1987) (personal loans received by union official because of his status were sufficiently related to the enterprise), *cert. denied*, 484 U.S. 1011 (1988); *United States v. LeRoy*, 687 F.2d 610, 617 (2d Cir. 1982) (illegal kickbacks received by union official because of his status were sufficiently related to the enterprise), *cert. denied*, 459 U.S. 1174 (1983), and civil RICO cases, *see, e.g.*, *Farberware, Inc. v. Groben*, 764 F. Supp. 296, 307 (S.D.N.Y. 1991) ("[D]efendant here allegedly corrupted, through racketeering activities, the negotiation of contracts entered into as a regular part of plaintiff's business. Thus, the predicate acts 'are related to the activities' of the enterprise under *Scotto*, and plaintiff has sufficiently alleged participation in or conduct of Farberware's affairs."); *New York v. Joseph L. Balkan, Inc.*, 656 F. Supp. 536, 543-44 (E.D.N.Y. 1987) (contractor held sufficiently "associated with" city sewer bureau by bribing its employees and repeatedly mailing false permit applications to the bureau).

element in *Scotto*<sup>108</sup> was consistently followed in the Third Circuit<sup>109</sup> and in the Ninth Circuit.<sup>110</sup> With certain modifications, it was also followed in the

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108. Nevertheless, as discussed at *supra* note 100, certain district courts in the Second Circuit, in cases involving accountants, followed a questionably more stringent standard and exonerated such wrongdoers from RICO liability, often without citing—much less distinguishing—*Scotto*. See, e.g., *Morin*, 747 F. Supp. at 1066 (requiring plaintiff to replead and demonstrate “a factual basis for regarding the relationship between particular defendants (such as the appraisers, accountants, and lawyers) and the enterprise to be different than the typical contractual relationship between client and professional”); *Griffin*, 744 F. Supp. at 1255 n.18 (same in dictum); *Goldman*, 706 F. Supp. at 261-62 (same). But see *Nat’l Union Fire Ins. Co. v. Calfinvest*, No. 90 Civ. 2476, 1992 U.S. Dist. LEXIS 1956, at \*22-23 (S.D.N.Y. Feb. 13, 1992); *Vista Co. v. Columbia Pictures Indus., Inc.*, 725 F. Supp. 1286, 1298-99 (S.D.N.Y. 1989) (allegation that motion picture sellers retained security interest in motion pictures that entitled sellers to exercise high level of control over buyers’ principal business was sufficient to state claim that sellers conducted or participated in buyers’ affairs). Such broad construction on the criminal side, but narrow construction on the civil side, turns the usual approach on its head. See *supra* note 7 (discussing liberal construction).

109. In *United States v. Provenzano*, 688 F.2d 194 (3d Cir.), *cert. denied*, 459 U.S. 1071 (1982), affirming a union official’s conviction for accepting bribes in exchange for allowing violations of the collective bargaining unit, where the RICO enterprise was the union local, the Third Circuit stated that “the fact that the union was harmed rather than benefitted does not remove the conduct from RICO’s gambit. . . . It is only when the predicate acts are unrelated to the enterprise or the actor’s association with it that the nexus element is missing, and consequently there is no RICO violation.” *Id.* at 200; see also *United States v. Zaubert*, 857 F.2d 137, 150 (3d Cir. 1988) (affirming RICO conspiracy conviction for kickback scheme in connection with pension fund loan where enterprise was the recipient of the loans; making loan to corporation constitutes participating in the conduct of its affairs), *cert. denied*, 489 U.S. 1066 (1989); *United States v. Palmeri*, 630 F.2d 192, 199 n.3 (3d Cir. 1980) (“If two or more violations of § 1954 are established, the defendant becomes subject to § 1962(c), which requires that these two ‘acts of racketeering’ be related to the conduct of the enterprise.”), *cert. denied*, 450 U.S. 967 (1981). The Third Circuit’s approach in these cases was that § 1962(c)’s language and legislative history:

indicate[] a congressional intent to reach *all* patterns of racketeering activity engaged in by persons employed by or associated with enterprises whose activities affect interstate commerce. . . . There is a legitimate federal interest in preventing the corruption and subversion of interstate enterprises, and it is this corruption which RICO seeks to eradicate.

*Acampora v. Boise Cascade Corp.*, 635 F. Supp. 66, 70 (D.N.J. 1986) (quoting *United States v. Vignola*, 464 F. Supp. 1091, 1098 (E.D. Pa.), *aff’d*, 605 F.2d 1199 (3d Cir. 1979), *cert. denied*, 444 U.S. 1072 (1980)).

110. See, e.g., *Yarbrough*, 852 F.2d at 1544 (affirming RICO conviction for participation in right wing supremacy group and stating that “[t]he Ninth Circuit has adopted the *Scotto* test,” i.e., it is enough that the predicate acts have some relationship to the enterprise); *Sun Sav. & Loan Ass’n v. Dierdorff*, 825 F.2d 187, 195 (9th Cir. 1987) (thrift institution alleged requisite nexus between its former president’s racketeering activity and its affairs:

When he committed the alleged predicate acts of mail fraud, Dierdorff acted in his capacity as Sun’s president. The acts of mail fraud were all related to the activities of Sun. Therefore, the complaint adequately alleges that Dierdorff conducted or participated in the conduct of Sun’s affairs through a pattern of racketeering activity.”);

see also *Blake*, 856 F.2d at 1372 (outside counsel, who held positions of influence at thrift, had access to records which demonstrated its true financial condition, and reviewed its reports and releases to shareholders, found to have conducted or participated, directly or indirectly, in the conduct of its affairs); cf. *Ikuno v. Yip*, 912 F.2d 306, 309-10 (9th Cir. 1990) (evidence concerning attorney’s involvement with corporation engaged in commodities trading raised fact issue as to whether his conduct caused investor’s losses occurring when corporation ceased doing business, thereby precluding entry of summary judgment for attorney); *Virden v. Graphics One*, 623 F. Supp. 1417, 1428-29 (C.D. Cal. 1985) (surveying various “conduct” tests before concluding that “a RICO plaintiff pursuing a private cause of action under [§ ] 1962(c) need only prove that the predicate acts are related to the affairs of the RICO enterprise”).

Fifth,<sup>111</sup> Sixth<sup>112</sup> and Seventh Circuits.<sup>113</sup>

Little that is charitable can be said of the state of the law in other circuits.<sup>114</sup> The Eighth Circuit, for example, followed inconsistent standards in civil and criminal RICO cases. In *Bennett v. Berg*,<sup>115</sup> over 2,500 present and former residents of a retirement community brought a civil RICO action alleging that it was subject to

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111. The Fifth Circuit originally adopted the *Scotto* approach; it stated that § 1962(c) merely required some "relation between the predicate offenses and the affairs of the enterprise." *United States v. Welch*, 656 F.2d 1039, 1061 (5th Cir. 1981) (emphasis added), *cert. denied*, 456 U.S. 915 (1982). Nevertheless, less than two years later, in *Cauble*, the Fifth Circuit modified the *Scotto* test:

A defendant does not "conduct" or "participate in the conduct" of a lawful enterprise's affairs, unless (1) the defendant has in fact committed the racketeering acts as alleged; (2) the defendant's position in the enterprise facilitated his commission of the racketeering acts, and (3) the predicate acts had some effect on the lawful enterprise.

*Cauble*, F.2d at 1332-33 (emphasis added) (footnote omitted). The Fifth Circuit observed that its test could not be met where a defendant simply "work[ed] for a legitimate enterprise and commits racketeering acts while on the business premises." *Id.* at 1332. Further, "a defendant's mere association with a lawful enterprise whose affairs are conducted through a pattern of racketeering activity in which he is not personally engaged" does not violate RICO. *Id.* The *Cauble* court held, however, that establishing an "effect" on the enterprise was not a stringent requirement; it could be satisfied, for example, by the defendant's depositing funds in the enterprise's bank accounts. *Id.* at 1333 n.24. The court then affirmed a § 1962(c) conviction where the defendant used assets and capital of his partnership—the RICO enterprise—to aid and abet drug smuggling activities. *Id.* at 1341; *see also Akin*, 959 F.2d at 533-34 ("[B]efore we can conclude that a defendant participates in the conduct of an enterprise's affairs, there must be a nexus between the defendant, the enterprise, and the racketeering activity. In this Circuit, this nexus is established by proof that the defendant has in fact committed the racketeering acts alleged, that the defendants's association with the enterprise facilitated the commission of the acts, and that the acts had some effect on the enterprise.") (citations omitted); *Taxable Mun. Bond Sec. Litig.*, MDL Docket No. 863, 1992 U.S. Dist. LEXIS 7298, at \*21-22 (E.D. La. May 20, 1992) (stating that

[I]t is not necessary for plaintiffs to allege that defendants occupied a position of power within the enterprises. It is sufficient that plaintiffs allege such relationship between defendants and the enterprise by which defendants' performance of activities is necessary or helpful to the operation of the enterprise. In this case, plaintiffs have adequately alleged that the defendants' association with the alleged scheme facilitated their commission of the racketeering acts. (footnote omitted)).

112. *See, e.g., United States v. Qaoud*, 777 F.2d 1105, 1115 (6th Cir. 1985), *cert. denied*, 475 U.S. 1098 (1986).

113. *See Mokol*, 957 F.2d at 1417-18; *Overnite Transp. Co. v. Truck Drivers, Oil Drivers, Filling Station & Platform Workers Union Local No. 705*, 904 F.2d 391, 393-94 (7th Cir. 1990); *United States v. Pieper*, 854 F.2d 1020, 1026 (7th Cir. 1988); *United States v. Horak*, 833 F.2d 1235, 1239 (7th Cir. 1987).

114. In *United States v. Carter*, the Eleventh Circuit declined to adopt or reject *Cauble*. Instead, it followed its less restrictive test. 721 F.2d 1514, 1527 & n.16 (11th Cir.), *cert. denied*, 469 U.S. 819 (1984). Other circuits acted inconsistently. For example, in *United States v. Mandel*, 591 F.2d 1347, 1375 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980), the Fourth Circuit foreshadowed the Eighth Circuit test: the "conduct or participate" language in § 1962(c) "require[s] some involvement in the operation or management of the business." The status in Fourth Circuit jurisprudence of the vacated opinion in *Mandel* is, however, problematic. *See Ray L. Earnest, Note, United States v. Mandel: The Mail Fraud and En Banc Procedural Issues*, 40 MD. L. REV. 550, 582 n.178 (1981). A later Fourth Circuit decision also applied RICO to an "outsider" who committed criminal acts through use of the enterprise's resources without managing, operating, or controlling it as such. *United States v. Webster*, 639 F.2d 174 (4th Cir.) ("operating through" requires "advance or benefit"; relying on *Mandel*), *cert. denied*, 454 U.S. 857 (1981), *modified on rehearing*, 669 F.2d 185, 187 (4th Cir.) (upholding RICO conviction where defendants' participation in the conduct of the enterprise's affairs consisted of using the telephone, facilities and personnel of an entertainment club as a base for carrying out narcotics transactions), *cert. denied*, 456 U.S. 935 (1982).

115. 685 F.2d 1053 (8th Cir. 1982), *cert. denied*, 464 U.S. 1008 (1983).

financial mismanagement and self-dealing. Plaintiffs alleged that they were in danger of losing "life-care" that they were promised; they named as defendants the project's mortgage lender, Prudential Insurance Co., as well as its accountants and attorneys. Affirming in part and reversing in part the district court's dismissal of the retirees' RICO claims, a panel of the Eighth Circuit rejected certain professional defendants' contention that they did not fall within § 1962(c). The court stated, "[T]hese defendants were the mortgage lender and accountant to the Village. [Defendants] were 'associated with' an enterprise."<sup>116</sup> Subsequently, sitting *en banc*, the Eighth Circuit expressed concern that plaintiffs' complaint "may be deficient as failing to allege adequately the requisite *degree* of participation in or conduct of the affairs of an enterprise on the part of each named defendant."<sup>117</sup> It then suggested in dictum:

Mere participation in the predicate offenses listed in RICO, even in conjunction with a RICO enterprise, may be insufficient to support a RICO cause of action. A defendant's participation must be in the conduct of the affairs of a RICO enterprise, which ordinarily will require some participation in the operation or management of the enterprise itself.<sup>118</sup>

*Bennett* relied on the Fourth Circuit's decision in *United States v. Mandel*,<sup>119</sup> yet the Eighth Circuit failed to notice that the validity of that decision, the progenitor of the Fourth Circuit's more restrictive test, was (at best) problematic in that circuit. In addition, on remand, District Judge Ross T. Roberts denied Prudential's and the accountants' motion to dismiss, holding that the amended complaint sufficiently alleged their participation in the enterprise.<sup>120</sup>

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116. *Id.* at 1063 n.16.

117. *Bennett v. Berg*, 710 F.2d 1361, 1364 (8th Cir.) (*en banc*) (emphasis in original), *cert. denied*, 464 U.S. 1008 (1983).

118. *Id.* (citing *Mandel*, 591 F.2d at 1375-76).

119. 591 F.2d 1347 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980).

120. Judge Roberts stated:

I do not believe the words "conduct or participate, directly or indirectly, in the conduct of the enterprise's affairs" can reasonably be limited to the sort of "hands-on-management" of daily activities which Prudential and [defendant-accountants] SG&M suggest. I find no case authority supporting such a proposition; and to require that degree of involvement would both seem counter to the broad Congressional directive that "[t]he provisions of RICO shall be liberally construed to effectuate its remedial purposes," and incompatible with the express language of the statute, which provides that such conduct or participation in the affairs of the enterprise may be accomplished "directly or indirectly." Unfortunately, neither the Eighth Circuit nor any other court which has focused separately on this language has undertaken to furnish any clear guidelines in the matter; but if this wording must be viewed in isolation from the remainder of the statutory language which follows, as the Eighth Circuit's *en banc* observation might seem to suggest, it seems to me no more can logically be required than that the defendant be involved in activities which constitute some meaningful aspect of the operation or management of the affairs of the enterprise.

*Bennett v. Berg*, Case No. 80-0381-CV-W, 1984 WL 2756, at \*4 (W.D. Mo. June 21, 1984) (quoting Pub. L. 91-452, § 904(a), 84 Stat. 947 (1970)) (citations omitted) (emphasis added).



The dicta in *Bennett*, however, was soon followed by the Eighth Circuit's decision in *Reves*. The district court granted summary judgment on the investors' RICO claims against Arthur Young, the cooperative's outside auditor. The judgment was affirmed by the Eighth Circuit, which held that the auditor's involvement in the enterprise's affairs "did not rise to the level required for a RICO violation."<sup>121</sup> The court stated that participation in the conduct of the affairs of an enterprise in violation of § 1962(c) "ordinarily will require some participation in [its] operation or management,"<sup>122</sup> and it held that Arthur Young's actions "in no way rise to the level of participation in the management or operation of" the cooperative, even though "[i]n the course of this involvement it is clear that Arthur Young committed a number of reprehensible acts."<sup>123</sup>

Significantly, in *Reves* the Eighth Circuit ignored its earlier decision in *United States v. Ellison*,<sup>124</sup> a criminal prosecution, where it did *not* even cite *Bennett*, but endorsed the Fifth Circuit's *Cauble* standard. In *Ellison*, the court affirmed the conviction of the leader of a white supremacy group over the challenge that one of the acts of arson proved as part of the pattern of racketeering activity did not involve the "conduct" of the affairs of that group.<sup>125</sup> The Eighth Circuit noted that "[t]he government did not have to prove that Ellison's racketeering activity benefitted the enterprise, but only that the predicate acts *affected* the enterprise."<sup>126</sup>

In RICO criminal prosecutions prior to *Reves*, circuit and district courts usually reasoned that unlawful activity carried out far below the level of senior management could yield significant profits to wrongdoers and thwart the attainment of the enterprise's legitimate goals. Thus, courts recognized that "outsiders" who assist an enterprise to commit crimes, use its resources for criminal purposes, or influence its actions "participate . . . in the conduct of its affairs" through the prohibited pattern of racketeering activity in violation of § 1962(c), even though this activity did not significantly control its overall goals.<sup>127</sup> In affirming RICO

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121. *Reves I*, 937 F.2d at 1324.

122. *Id.* (quoting *Bennett*, 710 F.2d at 1364).

123. *Id.*

124. 793 F.2d 942 (8th Cir.), *cert. denied*, 479 U.S. 937 (1986).

125. *Id.* at 950.

126. *Id.* (emphasis in original) (citing *Cauble*, 706 F.2d at 1333 n.24).

127. For example, in *United States v. Stofsky*, 409 F. Supp. 609 (S.D.N.Y. 1973), an early criminal RICO prosecution charging union officials and employees in the fur garment manufacturing industry, then District Judge Pierce rejected a constitutional challenge to § 1962(c), observing that the statute on its face contains "a necessary connection between the person who would commit the enumerated predicate acts and the enterprise, and between the acts and that person's participation in the operations of the enterprise." *Id.* at 613. Although he acknowledged that § 1962(c) "does not define this connection by distinguishing between predicate acts which play a major or a minor role, or any role at all, in what might be seen as the usual operations of the enterprise," nor, contrary to defendants' arguments, "does it require that such acts be in furtherance of the enterprise," *id.*, Judge Pierce, nonetheless, resisted defendants' attempt to limit the statute's reach:

The perversion of legitimate business may take many forms. The goals of the enterprise may

convictions, the courts of appeals consistently construed the statute broadly to reach a wide range of misconduct. For example, in *United States v. Yonan*,<sup>128</sup> the Seventh Circuit held that a criminal defense attorney who attempted to bribe a prosecutor in order to influence the disposition of cases had participated in the “conduct” of the affairs of the State’s Attorney’s Office.<sup>129</sup>

Before *Reves*, the decisions in criminal RICO prosecutions reflected that the “conduct or participate” requirement of § 1962(c) was satisfied whenever a defendant:

(1) engaged in racketeering activity through the enterprise that *furthered* the enterprise’s objectives;<sup>130</sup>

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themselves be perverted. Or the legitimate goals may be continued as a front for unrelated criminal activity. Or the criminal activity may be pursued by some persons in direct conflict with the legitimate goals, pursued by others. Or the criminal activity may, indeed, be utilized to further otherwise legitimate goals. No good reason suggests itself as to why Congress should want to cover some, but not all of these forms; nor is there any good reason why this Court should construe the statute to do so. It plainly says that it places criminal responsibility on both those who conduct and those who participate, directly or indirectly, in the conduct of the affairs of the enterprise, without regard to what the enterprise was or was not about at the time in question. This may be broad, but it is not vague.

*Id.*

128. 800 F.2d 164 (7th Cir. 1986), *cert. denied*, 479 U.S. 1055 (1987).

129. *Id.* at 167. The Seventh Circuit observed:

Section 1962(c) literally prohibits persons “employed by or associated with” an enterprise from illicitly conducting or participating in the conduct of the enterprise’s affairs; the statute makes no mention of such persons needing a “stake or interest in the goals of the enterprise.” Similarly, there is no statutory requirement that such persons have contact with policymakers or heads of enterprises before they can be said to be associated with it. In the absence of a statutory definition of “association,” the cases have adopted a common sense reading of the term that focuses on the business of the enterprise and the relationship of the defendant to that business. The cases make clear that the defendant need not have a stake in the enterprise’s “goals,” but can associate with the enterprise by conducting business with it, even if in doing so the defendant is *subverting* the enterprise’s goals.

*Id.* (emphasis in original).

As the Court applied its test to the facts of the case before it:

Here, the defendant is clearly alleged to have a business relationship with the enterprise. The relevant business of the Cook County State’s Attorney’s Office is to prosecute and otherwise dispose of criminal cases; Yonan’s business as an attorney was to negotiate with, oppose, or otherwise deal with that office in representing criminal defendants. This alleged relationship is sufficient for the court to find that Yonan was associated with the State’s Attorney’s Office for purposes of section 1962(c).

*Id.* at 168; *accord Mokol*, 957 F.2d at 1417-18 (affirming RICO conviction and holding that chief deputy sheriff who accepted bribes in exchange for protecting illegal video poker operation was “associated with” the amusement company/RICO enterprise).

130. When a defendant’s racketeering activity *furthered* the objectives of an illegal enterprise, the “conduct or participate” element was usually held to be satisfied. *See, e.g., Ellison*, 793 F.2d at 950 (leader of white supremacy group directed arson activities involving that enterprise, which boosted members’ morale and commitment); *United States v. Watchmaker*, 761 F.2d 1459, 1476 (11th Cir. 1985) (RICO conviction affirmed where defendant’s

- (2) *used* the enterprise's resources or his association with the enterprise to facilitate his or her crimes;<sup>131</sup> or
- (3) *targeted* criminal activity so as to *corrupt* the enterprise's actions.<sup>132</sup>

These examples do not exhaust the way in which the "conduct or participate" element of § 1962(c) was satisfied in criminal RICO prosecutions before *Reves*. Ultimately, according to the pre-*Reves* criminal cases, the inquiry was whether the defendant carried out the affairs of the enterprise through a pattern of racketeering activity. The cases found no safe-harbor in the statute for so-called "independent" professionals or advisers who carried out a pattern of RICO predicate acts in the course of advising or representing the enterprise, and the courts concluded that no reasoned basis was offered why RICO should be read or applied differently in the

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only involvement in the enterprise—a motorcycle club engaged in prostitution and drug distribution—was a single incident in which he shot three people; even those persons peripherally involved in the enterprise may be held liable because "the RICO statute was not designed to apply only to the 'kingpins' of criminal enterprises"), *cert. denied*, 474 U.S. 1100 (1986). RICO prosecutions of the members of traditional organized crime families were also analyzed under this approach. *See, e.g., Minicone*, 960 F.2d at 1107-08 (defendant's involvement in victim's murder was related to conduct of criminal enterprise); *United States v. Angiulo*, 897 F.2d 1169, 1170-77 (1st Cir.) (defendants carried out business of organized crime family through gambling, murder and loan-sharking), *cert. denied*, 498 U.S. 845 (1990); *United States v. Indelicato*, 865 F.2d 1370, 1371 (2d Cir.) (*en banc*) (defendants conducted the affairs of the "commission" of La Cosa Nostra crime families through a pattern of murders), *cert. denied*, 493 U.S. 811 (1989). In addition, this analysis was used in prosecutions of persons who *furthered* the illegal acts of generally legal businesses. *See, e.g., Zauber*, 857 F.2d at 150 (pension fund officials furthered affairs of mortgage company by providing capital to the company for its loans in return for kickbacks solicited from company representatives); *Horak*, 833 F.2d at 1239 (employee of corporate subsidiary participated in the conduct of parent company's affairs by fraudulently procuring contracts for subsidiary which financially benefitted the parent: "conduct in [§ ] 1962(c) does not mean 'control' or 'manage,' and, in any event, [§ ] 1962(c) also proscribes 'participat[ion], directly or indirectly, in the conduct' of the affairs of the enterprise").

131. A defendant's *use* of the enterprise's resources also served to establish the requisite conduct or participation in the conduct of the enterprise's affairs. Typically, this form of "conducting" or "participating in the conduct of" an enterprise's affairs involved a defendant's use of his or her *position* in the enterprise to attain illegal ends. *See, e.g., United States v. Tillem*, 906 F.2d 814, 822 (2d Cir. 1990) (defendant was "enabled to commit extortion by reason of his position as an inspector and supervisor at the City Health Department"); *Robilotto*, 828 F.2d at 948 (union official used influence over union/enterprise to place union welfare funds, in return for which he received personal loans); *Qaoud*, 777 F.2d at 1115-17 (public officials accepted bribes and obstructed justice in court system); *Cauble*, 706 F.2d at 1341 (defendant used private jet and funds of the enterprise—a partnership—with his wife and son to facilitate his smuggling activities); *LeRoy*, 687 F.2d at 617 (defendant's position in union enabled him to obtain illegal payments and embezzle funds); *Scotto*, 641 F.2d at 51 (union officials received payoffs from employers for reducing fraudulent compensation claims and assisting employers in getting business). Even outsiders who *paid* an entity to perform illegal acts were held liable under RICO. *See United States v. Manzella*, 782 F.2d 533, 538 (5th Cir.) (RICO conspiracy involving customers of arson enterprise), *cert. denied*, 476 U.S. 1123 (1986).

132. In RICO criminal prosecutions, if the racketeering activity was *targeted* at the enterprise with the purpose or effect of corrupting its actions, the requisite conduct or participation element was met. The classic example is making payments to representatives of an organization to obtain improper action by the organization. *See, e.g., United States v. Kaplan*, 886 F.2d 536, 540-41 (2d Cir. 1989) (bribery of Parking Violations Bureau officials in return for contracts constituted conduct of Bureau's affairs), *cert. denied*, 493 U.S. 1076 (1990); *Yonan*, 800 F.2d at 167 (defense attorney who attempted to bribe prosecutor to influence disposition of cases participated in the conduct of affairs of State's Attorney's office); *United States v. Bright*, 630 F.2d 804, 830-31 (5th Cir. 1980) (bonding company paying kickbacks to sheriff's office in return for business held sufficiently "associated with" that office).

civil context. Accordingly, prior to *Reves*, the principles of statutory construction applied in civil treble damage actions brought under § 1964(c) of RICO were similar to those applied in the criminal context under § 1962(c).<sup>133</sup>

In its seminal decision in *Schacht v. Brown*,<sup>134</sup> the Seventh Circuit posited the applicable rule in civil RICO cases:

The nature of racketeering connections to an otherwise legitimate business suggests that elements outside a company may assist in obtaining the company's illegal goals. Thus, "[t]he substantive proscriptions of the RICO statute apply to insiders *and outsiders*—those merely 'associated with' an enterprise—who participate directly *and indirectly* in the enterprise's affairs through a pattern of racketeering activity. Thus, the RICO net is woven tightly to trap even the smallest fish, those peripherally involved with the enterprise."<sup>135</sup>

In *Schacht*, the Director of Insurance of the State of Illinois ("Director"), acting in his role as statutory liquidator of an insolvent insurer ("Reserve"), brought a civil RICO action against Reserve's officers, directors, and parent corporation ("ARC") who allegedly continued Reserve in business past the point of insolvency and looted it of its most profitable (and least risky) business by entering into long-term contracts with other insurers. The Director also sued three accounting firms (Coopers & Lybrand, Alexander Grant & Company, and Arthur Andersen & Company), alleging that they knew of Reserve's insolvency and of the further impairing effect of Reserve's continued operations but that, despite this knowledge, each of them had prepared unqualified opinion letters as to ARC's consolidated financial statements in 1974, 1975, 1976 and 1977.<sup>136</sup>

Affirming the district court's denial of defendants' motions to dismiss, the Seventh Circuit rejected their argument that § 1962(c) required that they must be an "insider" or "manager" of the damage-causing enterprise in order to suffer liability. Stating that "[w]e do not believe that the language and purpose of Section

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133. See, e.g., *Kearny v. Hudson Meadows Urban Renewal Corp.*, 829 F.2d 1263, 1269 (3d Cir. 1987) (The Third Circuit observed:

A party is not shielded from RICO liability merely because he was not one of the creators or prime movers of the enterprise. Participation in the enterprise, if substantial, as Jerry Turco's participation could be found to be, is enough to establish liability, regardless of whether the timing of such substantial participation postdates the commencement of the enterprise. Both the captains and the lately enlisted foot soldiers in the enterprise are liable for the damage caused by their predicate acts. (citation omitted)).

134. 711 F.2d 1343 (7th Cir.), *cert. denied*, 464 U.S. 1002 (1983).

135. *Id.* at 1360 (emphasis in original) (quoting *United States v. Starnes*, 644 F.2d 673, 679 (7th Cir.), *cert. denied*, 454 U.S. 826 (1981), and *Elliott*, 571 F.2d at 903); see also *Tille*, 729 F.2d at 620 ("Proof of defendant's association with the illegal activities of the enterprise is all that is required. Associated outsiders who participate in a racketeering enterprise's affairs fall within RICO's strictures.").

136. *Schacht*, 711 F.2d at 1345. In essence, the Director alleged that the accounting firm defendants joined with ARC and Reserve's officers and directors in a "multifaceted, fraudulent scheme which kept Reserve operating long past insolvency and in a manner which resulted in enormous loans to the latter company." *Id.* at 1345-46.

1962(c) supports such an interpretation," and noting that "[o]ther courts . . . have had little trouble in finding that defendants who are not managers or employees in the colloquial sense are nevertheless reached by Section 1962(c)," <sup>137</sup> the *Schacht* court concluded that the defendant insurance companies, "who allegedly entered into long-term contracts with ARC," and the defendant auditors, "who allegedly aided the managerial defendants in operating ARC through systematic fraud," were sufficiently "associated with" or "employed by" ARC "within the meaning of" § 1962(c). <sup>138</sup>

In its construction of § 1962(c) in *Reves*, <sup>139</sup> the Eighth Circuit specifically rejected the least restrictive standard, which was adopted by the Eleventh Circuit in *Bank of America National Trust & Savings Ass'n v. Touche Ross & Co.* <sup>140</sup> In *Bank of America*, the defendant accounting firm allegedly prepared false audited financial statements that were submitted to five banks, including Bank of America, that extended credit in reliance upon those statements. The Eleventh Circuit reversed the district court's dismissal of a civil RICO complaint, rejecting the contention advanced by Touche and a number of its partners, who were named as defendants in their individual capacity, that § 1962(c) required allegations and proof of their participation in the operation or management of the enterprise. <sup>141</sup>

The District of Columbia Circuit's decisions in *Yellow Bus Lines v. Drivers, Chauffeurs & Helpers Local Union 639* <sup>142</sup> adopted the most restrictive pre-*Reves* test. *Yellow Bus* arose from events surrounding a four-day strike by employees of

137. *Id.* at 1360. The Seventh Circuit cited numerous criminal and civil RICO cases from the Third, Fifth, Sixth, Seventh and Eighth Circuits in support of this statement. *Id.*

138. *Id.*

139. *Reves I*, 937 F.2d at 1324.

140. 782 F.2d 966 (11th Cir. 1986).

141. *Id.* at 970. The Eleventh Circuit observed:

RICO does not require the degree of participation urged by defendants. It is not necessary that a RICO defendant participate in the management or operation of the enterprise. On its face, [§ 1962(c)] requires only that the defendant "participate, directly or indirectly in the conduct of [the] enterprise's affairs . . ."

....

Defendants argue that Congress intended to limit the reach of a civil RICO action by imposing a "conduct" requirement, *i.e.*, that defendant conducted or participated in the conduct of a RICO enterprise in a significant manner. This argument ignores the "directly or indirectly" language of Section 1962(c).

The banks have alleged that defendants assisted in the preparation and dissemination of false financial statements. These financial statements were helpful to International Horizons because they allegedly induced the banks to lend money to the enterprise. The word "conduct" in Section 1962(c) simply means the performance of activities necessary or helpful to the operation of the enterprise.

Defendants' argument that they were independent auditors and, therefore, did not participate in International Horizons' affairs also misses the mark. This argument raises a question of fact that may not be addressed on a motion to dismiss.

*Id.* (citations omitted).

142. 839 F.2d 782 (D.C. Cir.) [hereinafter *Yellow Bus I*], *cert. denied*, 488 U.S. 926 (1988), *vacated and remanded on other grounds*, 492 U.S. 914 (1989), *on remand*, 883 F.2d 132 (D.C. Cir. 1989) [hereinafter *Yellow Bus II*], *rev'd en banc*, 913 F.2d 948 [hereinafter *Yellow Bus III*], *cert. denied*, 501 U.S. 1222 (1991).

the plaintiff company who were seeking recognition of the defendant union local as their bargaining representative. The civil RICO claim alleged that the union local engaged in a campaign of violence to sabotage the company and obtain concessions; the alleged enterprise was the company itself. The District of Columbia Circuit held that the complaint asserted a sufficient relationship between the racketeering activity and the enterprise and should not be dismissed by the district court, stating that "[a] strike for recognition of the union as a collective bargaining representative is an activity sufficiently related to the company's ongoing role as a business enterprise and employer to establish the requisite nexus."<sup>143</sup> After the circuit court's decision was vacated and remanded for reconsideration of the "pattern of racketeering activity" element in light of the Supreme Court's decision in *H.J., Inc. v. Northwestern Bell Tel. Co.*,<sup>144</sup> the panel again found no requirement that defendant's participation be at the management level or relate to the "core functions" of the enterprise.<sup>145</sup> Sitting *en banc*, the District of Columbia Circuit disagreed sharply with the previous panel decisions; it affirmed the district court's dismissal of the civil RICO claims against the labor union, holding that by merely conducting a recognition strike against the plaintiff employer, the union did not conduct or participate, directly or indirectly, in the conduct of the employer's affairs within the meaning of § 1962(c).<sup>146</sup>

In *Reves*, the Supreme Court granted certiorari to resolve the conflict between the District of Columbia Circuit's most restrictive standard, adopted in *Yellow Bus*, the Eighth Circuit's intermediate standard, and the Eleventh Circuit's least restrictive standard, set forth in *Bank of America*.<sup>147</sup>

## *B. Criminal Accomplice Liability: 18 U.S.C. § 2*

### *1. Introduction*

If an examination of pre-*Reves* RICO decisions is necessary to place *Reves* in context, so, too, is an examination of classic and well-established theories of secondary participation in criminal jurisprudence: accomplice<sup>148</sup> and conspiracy

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143. *Yellow Bus I*, 839 F.2d at 794.

144. 492 U.S. 229 (1989).

145. *Yellow Bus II*, 883 F.2d at 142-43.

146. *Yellow Bus III*, 913 F.2d at 954; *see also* *Danielsen v. Burnside-Ott Aviation Training Ctr., Inc.*, 941 F.2d 1220, 1231-32 (D.C. Cir. 1991) (employees of Navy aircraft maintenance contractors who alleged that contractors intentionally and continuously underpaid legally required minimum wages and fringe benefits failed to state RICO claims against contractors premised on status of U.S. Navy as RICO enterprise where employees made no allegation that contractors were participating in Navy's operation or management).

147. *Reves II*, 507 U.S. at 177.

148. "The term 'accomplice' is employed as the broadest and least technical available to denote criminal complicity. Unlike 'accessory' it has no special meanings under the common law or modern legislation." 1 AMERICAN LAW INSTITUTE (ALI), MODEL PENAL CODE AND COMMENTARIES 306 (1985) [hereinafter ALI, COMMENTARIES]. "The common classification of parties to a felony consisted of four categories: (1) principal in the first degree; (2) principal in the second degree; (3) accessory before the fact; and (4) accessory after the fact."

liability. In terms of traditional categories, *Reves* sets out the test for how RICO may be violated by a principal in the first degree, that is, a person who, with the appropriate state of mind, engages in the prohibited act or omission or causes the prohibited result. *Reves*, however, does not consider how RICO may be violated by an accessory before or after the fact, a principal in the second degree, or a co-conspirator. Therefore, an understanding of these traditional categories is required to understand what the *Reves* Court did and did not decide. In particular, due attention must be focused on the particular defendant's state of mind, conduct and capacity.

Federal criminal jurisprudence on accomplice liability is codified in 18 U.S.C. § 2, which, in relevant part, provides:

(a) Whoever commits an offense against the United States or aids, abets,

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WAYNE R. LAFAYE & AUSTIN W. SCOTT, *CRIMINAL LAW* 569 (2d ed. 1986); 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 34-40 (1769) ("A man may be a *principal* in an offense in two degrees: first degree . . . and second degree . . . . An accessory . . . either *before* or *after* the fact.") (emphasis in original); 1 SIR MATTHEW HALE, *HISTORIA PLACITORUM CORONAE* 615-17 (stating that

in . . . treason, there are no accessories . . . *before* nor *after*, for all consenters, aiders, abettors, and knowing receivers of traitors, are all principals . . . . In cases that are criminal, but not capital . . . there are no accessories, for all the accessories *before* are . . . principals . . . and [so are] accessories *after* . . . . As to felonies by act of parliament, regularly if an act of parliament enacts an offense to be felony, though it mentions nothing of accessories *before* or *after*, yet virtually, and consequently those that counsel or command the offense are accessories *before*, and those that knowingly receive the offender and accessories *after* . . . . [P]rincipals are in two kinds, principals in the first degree, which actually commit the offense, principals in the second degree, which are present, aiding, and abetting of the fact to be done. An accessory before, is he, that being absent at the time of the felony committed, doth yet procure, counsel, command, or abet another to commit a felony. . . . [An] accessory after the fact is, where a person knowing the felony committed by another, receives, relieves, comforts, or assists the felon.) (emphasis in original);

2 FREDERICK POLLOCK & FREDERIC W. MAITLAND, *THE HISTORY OF ENGLISH LAW* 509 (2d ed. 1896) (stating that

Ancient law has as a general rule no punishment for those who have tried to do harm but have not done it . . . . On the other hand, it is soon seen that harm can be done by words as well as by blows, and that if at A's instigation B has killed C, then A is guilty of C's death . . . . The law of homicide is wide enough to comprise not only him who gave the deadly blow and those who held the victim, but also those who 'procured, counselled, commanded or abetted' the felony."). "A principal in the first degree may simply be defined as the criminal actor. He is the one who, with the requisite mental state, engages in the act or omission concurring with the mental state which causes the criminal result.

LAFAYE & SCOTT, *supra*, at 569; see also BLACKSTONE, *supra*, at 34 ("he that is the actor"). "To be a principal in the second degree, one must be present [actually or constructively] at the commission of a criminal offense and aid, counsel, command or encourage the principal in the first degree in the commission of that offense." LAFAYE & SCOTT, *supra*, at 571; see also BLACKSTONE, *supra*, at 34 ("he who is present [actually or constructively] aiding and abetting the fact to be done"). "An accessory before the fact is one who orders, counsels, encourages, or otherwise aid and abets another to commit a felony and who is not present at the commission of the offense." LAFAYE & SCOTT, *supra*, at 571. "At common law, one not . . . a principal . . . was an accessory after the fact if a . . . felony had . . . been committed . . . ; he knew of . . . [it] and he gave aid to the felon personally for the purpose of hindering [law enforcement]." *Id.* at 596; see also BLACKSTONE, *supra*, at 35 ("not the chief actor . . . nor present . . . but in some way concerned . . . either *before* or *after* the fact committed") (emphasis in original).

counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.<sup>149</sup>

This statutory provision fleshes out the concept of “participation” by indicating that aiding, abetting, counselling, commanding, inducing, or procuring the substantive offense meets the act or omission requirement. These terms also “suggest that one may become an accomplice without actually rendering physical aid to the endeavor.”<sup>150</sup> The decisions often speak of “affirmative conduct” but, “under the general principle that an omission in violation of a legal duty will suffice, one may become an accomplice by not preventing a crime which he has a duty to prevent.”<sup>151</sup>

## 2. *State of Mind*

Judicial interpretations of § 2(a) on the issue of state of mind reflect a substantial debate carried out in the late 1930's, 1940's and 1950's, which was also reflected in the debate that preceded the adoption of the Model Penal Code by the American Law Institute in 1962.<sup>152</sup> The debate was rooted in the failure of Congress to set out a state of mind requirement for accomplice liability in the text of Title 18. One view, arguing for “intent,” that is, “purpose,”<sup>153</sup> is reflected in Judge Learned Hand's opinion in *United States v. Peoni*.<sup>154</sup> According to Judge Hand, the traditional definitions of accomplice liability

have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct; and . . . they all demand that he in some sort associate himself with the venture, that he participate in it as in something he wishes to bring about, that he seek by his action to make it succeed. All of the words used even the most colorless, ‘abet’—carry an

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149. 18 U.S.C. § 2 (1994).

150. LAFAVE & SCOTT, *supra* note 148, at 576.

151. *Id.* at 578. Our law is embodied in language, which possesses a history of its own. See POLLOCK & MAITLAND, *supra* note 148, at 80-87 (tracing the language of the law in its English, French and Latin roots). Its concepts are often expressed in couplets, reflecting essentially similar meanings, one word of English and the other of French origin. See, e.g., *McGuire v. Blount*, 199 U.S. 142, 147 (1905) (adverse possession must be “open and notorious”); 10 THE OXFORD ENGLISH DICTIONARY 834 (2d ed. 1989) (“open”: Anglo-Saxon or Old English meaning “plainly seen” or of “public knowledge”); 1 *id.* at 554 (“notorious”: Latin and French meaning “publicly or commonly known”). Strangely, while “aid and abet” is such a couplet, each word is of French and Latin origin. *Id.* at 273 (“aid”: French and Latin meaning “help, assist or support”); *id.* at 21 (“abet”: French and Norse meaning “support, maintain, or uphold”).

152. S. REP. NO. 96-553, at 76-77 (1980) (decisions noted).

153. “Generally, it may be said that accomplice liability exists when the accomplice intentionally encourages or assists, in the sense that his purpose is to encourage or assist another in the commission of a crime to which the accomplice has the requisite mental state.” LAFAVE & SCOTT, *supra* note 148, at 579-80.

154. 100 F.2d 401 (2d Cir. 1938).



implication of *purposive* attitude towards it.<sup>155</sup>

Thus, Judge Hand found that even though the defendant sold the counterfeit bills that were the subject of the indictment, he was not an accomplice to their resale: the defendant's "connection with the business ended when he got his money . . . . [I]t was of no moment to him whether [the man to whom he sold the bills] passed them himself."<sup>156</sup> Since 1938, *Peoni* reflects the law of the Second Circuit—that "intent" is the proper state of mind for accomplice liability.

A powerful argument may be made, however, in favor of "knowledge."<sup>157</sup> Judge John J. Parker's opinion in *Backun v. United States*<sup>158</sup> reflects this position. In *Backun*, the defendant was charged with the unlawful transportation of stolen property in interstate commerce because when he sold the stolen property, he knew that the buyer would carry it out of the state. Judge Parker stated that, "guilt as an accessory depends not on 'having a stake' in the outcome of crime," and held

the seller may not ignore the purpose for which the purchase is made if he is advised of that purpose, or wash his hands of the aid that he has given the perpetrator of a felony by the plea that he has merely made a sale of merchandise. . . . One who sells a gun to another knowing that he is buying it to commit murder, would hardly escape conviction as an accessory to the murder by showing that he received full price for the gun.<sup>159</sup>

The split between the Second and Fourth Circuits also quickly emerged into a full-scale debate among legal scholars over the proper state of mind for accomplice liability that was reflected in the 1962 promulgation of the Model Penal Code by the American Law Institute. The Final Draft required "that the actor have a *purpose* to promote or facilitate the offense in question."<sup>160</sup> The Institute rejected "broaden[ing] liability beyond merely purposive conduct . . . principally on the

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155. *Id.* at 402.

156. *Id.*

157. "In many cases, the facts will make it clear that the accessory actually intended to promote the criminal venture, in the sense that he was personally interested in its success . . . . But there are many instances in which the alleged accomplice's actions will qualify only as *knowing* assistance, in that he is lending assistance or encouragement to a criminal scheme toward which he is *indifferent*." LAFAVE & SCOTT, *supra* note 148, at 582 (emphasis added).

158. 112 F.2d 635 (4th Cir. 1940).

159. *Id.* at 637.

160. ALI, COMMENTARIES, *supra* note 148, at 314 (emphasis added). The original draft also imposed liability under the "knowledge" theory: if a person was "acting with *knowledge* that such other person was committing or had the *purpose* of committing the crime, [then] he *knowingly*, substantially facilitated its commission." MODEL PENAL CODE § 2.04(3)(b) (Tentative Draft No. 1, 1953) [hereinafter MODEL PENAL CODE DRAFT] (emphasis added). The first drafters felt that "conduct which *knowingly* facilitates the commission of crimes is by hypothesis a proper object of preventive effort by the penal law, unless, of course, it is affirmatively justifiable." *Id.* at 30. They realized that it was important "to safeguard the innocent but [felt that] the requirement of guilty knowledge adequately serve[d] that end." *Id.* Thus, the original drafters, aware of the debate regarding state of mind, decided that "absent special grounds that constitute legal justification, [the debate] ought to be resolved in favor of a principle that regards *crime prevention* as the prior value to be served." *Id.* at 31-32 (emphasis added).

argument that the need for stating a general principle in this section pointed to a narrow formulation in order not to include situations where liability was inappropriate.”<sup>161</sup> Consequently, the Model Penal Code requires “purpose,” or intent, to assist in the commission of a crime before any accomplice liability may be imposed.<sup>162</sup>

While the text of 18 U.S.C. § 2 is itself silent on the issue of state of mind, in 1949 the Supreme Court, in *Nye & Nissen v. United States*,<sup>163</sup> showed no reluctance to resolve the debate for federal criminal jurisprudence in favor of Judge Hand’s interpretation of “intent.”<sup>164</sup> In holding the defendant liable,<sup>165</sup> the Court adopted Judge Hand’s language from *Peoni*: “in order to aid and abet another to commit a crime it is necessary that a defendant ‘in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.’ ”<sup>166</sup> The federal courts

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161. ALI, COMMENTARIES, *supra* note 148, at 318. “So long as this purpose is proved, there is, it would seem, little risk of innocence; nor does there seem to be occasion to inquire into the precise extent of influence exerted on the ultimate commission of the crime.” *Id.* at 314; *see also id.* at 318 n.58 (“What is required is to give the courts and juries a criterion for drawing lines that must be drawn.”) (quoting ALI PROCEEDING 72-81 (1953)).

162. In 1980, the Senate Committee on the Judiciary proposed a revision of § 2(a) whereby a person could be held criminally liable “for an offense based upon the conduct of another person if: (1) he *intentionally* aids or abets the commission of the offense by the other person.” S. REP. NO. 96-553 at 74 (emphasis added). The Committee, however, also proposed an addition to existing liability for aiding and abetting: “[A] person is criminally liable for an offense based upon the conduct of another person if he *knowingly* facilitates the completion of the offense by providing assistance that is in fact substantial.” *Id.* at 75 (emphasis added). The punishment for a knowing substantial facilitation would have been two grades lower than that of the substantive offense. *Id.* In brief, the Committee sought a middle road in these two sections, distinguishing between an accomplice and a facilitator with a facilitator to be punished less severely than an accomplice. The Committee stated that “one who acts with an *awareness* or *consciousness* that he is promoting or facilitating a crime, even if he does not desire or intend that the crime be committed, is deserving of punishment, albeit at a lower level than one who acts with a *specific intent*—the traditional aider and abettor liability—that subjects the actor to the same degree of punishment as the principal.” *Id.* at 76 (emphasis added).

163. 336 U.S. 613 (1949).

164. “Aiding and abetting has . . . broad . . . application. It makes a defendant a principal when he consciously shares in any criminal act whether or not there is a conspiracy . . . Aiding and abetting . . . states a rule of criminal responsibility for acts which one assists another in performing.” *Id.* at 620.

165. In *Nye & Nissen*, a corporation was indicted for misrepresentation of weights, grades and prices of sales of dairy products sold to the War Shipping Administration. Circumstantial evidence existed that the president of the corporation was an aider and abettor in the misrepresentation. *Id.* at 619 (“Ample evidence in a record ruling with fraud that . . . [the defendant] was associated with the presentation of six false invoices.”).

166. *Nye & Nissen*, 336 U.S. at 619 (quoting *Peoni*, 100 F.2d at 402). *Nye & Nissen* remains good law. *See, e.g.,* Central Bank, N.A. v. First Interstate Bank, N.A., 114 S. Ct. 1439, 1450-52 (1994) (“§ 2, a general aiding and abetting statute applicable to all federal criminal offenses, . . . decrees that those who provide knowing aid to persons committing federal crimes, with the intent to facilitate the crime are themselves committing a crime.”) (citing *Nye & Nissen*, 336 U.S. at 619). The Senate Committee on the Judiciary, however, erroneously treated the issue as open in 1980. S. REP. NO. 96-553 at 76 (“Current law is ambivalent on the question of culpability under 18 U.S.C. § 2(a)”) (citing *United States v. Greer*, 467 F.2d 1064, 1069 (7th Cir. 1972), *cert. denied*, 410 U.S. 929 (1973), and *United States v. Harris*, 435 F.2d 74, 88-89 (D.C. Cir. 1970), *cert. denied*, 402 U.S. 986 (1971), as holding “knowingly aiding a crime is sufficient *scienter*”). In fact, *Greer* expressly follows the *Peoni* rule. *Greer*, 467 F.2d at 1060. The focus of the Seventh Circuit’s opinion is not on state of mind for aiding and abetting, but the scope of liability for related crimes when aiding and abetting is established; the Committee, however, misread the

of appeals now uniformly use "intent" as the necessary state of mind for accomplice liability, although occasionally "knowledge" language (or knowledge-like results) can be found in the opinions.<sup>167</sup>

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case. See LAFAVE & SCOTT, *supra* note 148, at 590 ("The established rule, as it is usually stated . . . , is that accomplice liability [of the principal in the second degree] extends to acts of the principal in the first degree which were a natural and probable consequence of the criminal scheme the accomplice encouraged or aided.") *Harris* is discussed *infra* at the text accompanying note 187 *et. seq.* That the Committee was confused by *Harris* is understandable; the opinion itself is confusing.

167. See, e.g., *United States v. Howard*, 13 F.3d 1500, 1502 (11th Cir. 1994) (three defendants convicted of being accomplices to the unauthorized decryption of satellite cable programming because they sold as part of their business electronic descrambling devices modified in such a way as to make them capable of illegally obtaining cable programs; "To support a conviction for aiding and abetting an offense, the evidence must simply show that the defendant was associated with the criminal venture, participated in it as something he wished to bring about, and sought by his action to make it succeed.") (citations omitted); *United States v. Cassiere*, 4 F.3d 1006, 1011-13 (1st Cir. 1993) (senior partner in a two-person law firm and real estate appraiser convicted as aiders and abettors to wire fraud in a scheme in which a company bought real property low and immediately resold it high to straw buyers in order to defraud lenders of the true value of land to obtain loans at the higher resale price;

To support convictions of aiding and abetting wire fraud, the government must prove that the "defendant associated [herself] with the underlying venture, participated in it as something [she] wished to bring about, and sought by [her] actions to make it succeed." . . . [The lawyer] participated in all the double closings, . . . handled the distribution of all the proceeds from the second half of the flip, . . . and [never informed the lending institutions] that the same law firm had closed twice on the same property on the same day and with such wide price disparities. . . . Although [the real estate appraiser] never participated in the closings, . . . [h]er appraisal forms . . . supported the high second price and thus resulted in the higher mortgages . . . and there was ample evidence which the jury could conclude that [she] frequently misstated the conditions of the appraisal properties, making them appear more valuable than they were.)

(citations omitted); *United States v. Canon*, 993 F.2d 1439, 1442 (9th Cir. 1993) (defendant convicted of being an accomplice to possession of firearm by a felon after he, the passenger in a car, handed the driver a gun during a high-speed chase that occurred as the result of the police trying to pull the car over for a broken headlight; "The government had only to prove [defendant], as an aider and abettor, 'associate[d] himself with [his co-defendant's] crime, that he participate[d] in it as in something that he wishe[d] to bring about, [and] that he [sought] by his action to make it succeed.' ") (citations omitted); *United States v. Menesses*, 962 F.2d 420, 427 (5th Cir. 1992) (accomplice conviction reversed for the driver of a car who followed a truck, which contained smuggled cocaine, allegedly as a lookout;

To sustain a conviction of aiding and abetting under 18 U.S.C. § 2, the government must show that the defendant (1) associated himself with the criminal venture, (2) participated in the venture, and (3) sought by [sic] action to make the venture succeed. At most, the government may have proven that Bratovich "participated" in the criminal venture, but "[a]ssociation" means that the defendant shared in the criminal intent of the principal)

(citations omitted); *United States v. Morrow*, 977 F.2d 222, 230-31 (6th Cir. 1992) (defendant convicted of being an accomplice to his partner's carrying of a firearm in relation to a drug trafficking offense involving the two cutting marijuana plants;

Judge Learned Hand aptly characterized aiding and abetting as one's desire to "in some sort associate himself with the venture, that he participate in it as in something he wishes to bring about, that he seek by his action to make it succeed." Judge Hand's conception of aiding and abetting has been adopted by the Supreme Court. . . . As noted under 18 U.S.C. § 2, the government must prove that the defendant both associated and participated in the use of the firearm in connection with the underlying crime. . . . Concededly, mere presence and knowledge of the offense would not be sufficient to convict Morrow on this basis. . . . Defendant's act of wearing a

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ski mask to protect himself, when combined with the certainty that Morrow must have observed the weapon, leads to a reasonable inference that he likewise intended that the weapon be used for protection, not from snakes, but from other individuals who might intervene with the trafficking venture. [The defendant] was as much a potential beneficiary of the firearm being present as was [his partner]. The firearm was facilitating [defendant's] drug trafficking efforts just as it was for [his partner]. Thus, the evidence established both aspects of an aiding and abetting offense.)

(citations omitted), *cert. denied*, 508 U.S. 975 (1993); *United States v. Langston*, 970 F.2d 692, 705-08 (10th Cir.) (sufficient evidence existed to find three men as being accomplices to drug manufacturing because they had all participated in the process, even if insufficient evidence existed to convict them as principals in the first degree;

To be an aider and abettor requires that a defendant "associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." . . . We conclude that from the government's evidence the jury could reasonably infer [defendant 1] was aware of the amphetamine manufacturing operation. . . . In addition the jury could infer [his] knowledge about, as well as his participation in, the operation from [witness's] testimony. . . . In view of the evidence of [defendant 2's] knowledge, about and participation in, the laboratory operation, we are not persuaded by his argument that the circumstances were equally consistent with an innocent explanation for his presence at the ranch. . . . The jury could reasonably infer that [defendant 3] transported the four men and a substantial part of the laboratory equipment to the ranch for the apparent purpose of carrying out the unlawful scheme.)

(citations omitted), *cert. denied*, 506 U.S. 965 (1992); *United States v. Horton*, 921 F.2d 540, 543-44 (4th Cir. 1990) (defendant convicted as an accomplice to the murder of a fellow inmate in the jail shower because he warned other inmates not to come down to the shower and stabbed the decedent at least once;

[I]n order to aid and abet another to commit a crime it is necessary that a defendant "in some sort associate himself with the venture, that he participate in it as in something he wished to bring about, that he seek by his action to make it succeed." Simply put, "[a]iding and abetting means to assist the perpetrator of the crime." The evidence of concerted action included testimony that [the three suspects] lingered on the tier together, went down to the shower together and came out together.)

(citations omitted), *cert. denied*, 501 U.S. 1234 (1991); *United States v. Hooks*, 848 F.2d 785, 789 (7th Cir. 1988) (defendant convicted of aiding and abetting preparation of materially false federal tax return on decedent's estate when he concealed bonds in bank safe and then sold them to avoid estate tax;

In order to aid and abet another to commit a crime it is necessary that a defendant "in some sort associate himself with the venture, that he participate in it as in something he wishes to bring about, that he seek by his action to make it succeed." . . . The government showed that [defendant] engaged in affirmative participation to make the common goal successful: He both concealed and liquidated the bearer bonds which were purportedly assets of the . . . estate. The evidence established that [the defendant] received from [the beneficiary] the ten bonds that should have been turned over to the tax preparer; that he hid those bonds in his employer's safe deposit box; and that he later cashed the bonds with the aid of his co-defendant . . . in such a way that they could not be traced back to him or to the estate. As a result, the estate did not include those bonds, [the defendants] were the beneficiaries of the proceeds of the bonds, and the . . . estate tax return, which did not report approximately \$375,000 in assets, was false.)

(citations omitted); *United States v. Sigalow*, 812 F.2d 783, 785 (2d Cir. 1987) (manager and front man of two massage parlors who knew of the substantive prostitution offenses found guilty of being accomplices to a prostitution enterprise through the use of mails;

A defendant can be convicted as an aider and abettor without proof that he participated in each and every element of the offense. The government need prove only "that [the] defendant in some sort associate[d] himself with the venture [and] that he participate[d] in it as in something that he wishe[d] to bring about.")

(citations omitted); *United States v. Grey-Bear*, 828 F.2d 1286, 1292-93 (8th Cir. 1987) (conviction of one defendant sustained and convictions of nine others reversed in being accomplices to murder of man who was chased, beat up, and left lying on the highway to die;

Title 18 U.S.C. § 2(a) (1982) mandates that whoever "aids, abets, counsels, commands, induces, or procures" an offense against the United States "is punishable as a principal." To fall within this proscription, a defendant must "in some sort associate himself with the venture, that he participate in it as in something he wishes to bring about, that he seek by his action to make it succeed." . . . We have previously observed that "[b]y far the most important element is the sharing of the criminal intent of the principal, and this is concededly difficult to prove; nevertheless the Government must prove this sharing of criminal intent. Generally speaking, to find one guilty as a principal on the ground that he was an aider and abettor, it must be proven that he shared in the criminal intent of the principal and there must be a community of unlawful purpose at the time the act is committed." It follows, and has often been stressed by this court, that mere presence at the scene of the crime is insufficient proof on which to base an aiding and abetting conviction. Mere association with the principal and even knowledge that a crime is about to be committed are also insufficient to support an aiding and abetting conviction without proof of culpable purpose. . . . "[T]he necessity for proving facts other than presence has been explained as an 'essential safeguard against the ever present danger of assuming the complicity of all in attendance whenever group activity is involved.' "

(citations omitted), *cert. denied*, 493 U.S. 1047 (1990); *United States v. Bey*, 736 F.2d 891, 895 (3d Cir. 1984) (defendant convicted as an accomplice to a drug transaction in which the principal went to his house to pick up the heroin that was sold to an undercover cop;

To support a conviction on a charge of aiding and abetting another to commit a crime, the prosecution must show that the defendant "in some sort associate[d] himself with the venture, that he participate[d] in it as in something he wishe[d] to bring about, that he [sought] by his action to make it succeed." When the charge of aiding and abetting is submitted to the jury, the court must include in its instruction the thought that mere knowledge of the crime is insufficient to bring about a conviction. . . . The trial court's charge makes clear that [defendant's] mere presence and knowledge of the crime would not constitute aiding and abetting, but on the contrary, that his intentional involvement is required.);

*United States v. Raper*, 676 F.2d 841, 849 (D.C. Cir. 1982) (defendant convicted of aiding and abetting the possession of heroin with intent to distribute after he collected the money for a heroin transaction even though he was not the one who actually passed the heroin to the purchaser; The classic interpretation of the aiding and abetting rule of law is that by Judge Learned Hand in *Peoni*, which was quoted by Justice Douglas in *Nye & Nissen*:

In order to aid an abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.' . . . What is required on the part of the aider is sufficient knowledge and participation to indicate that he knowingly and willfully participated in the offense in a manner that indicated he intended to make it succeed. . . . [I]t could properly have been found by the jury from the testimony that [defendant] *intended . . . the guilty principal to make the sale to the Third Man, knew that [the principal] was making the sale, and, indeed, participated as a middleman in the sale by collecting the money from the Third Man, directing the Third Man to [the principal] for the transfer of the heroin, and by informing [the principal] that he had been paid and that [the principal] was accordingly free to deliver the heroin to the Third Man. [Defendant's] acts, in apparently arranging the sale, receiving the money, and counselling [the principal] satisfied all the requirements under 18 U.S.C. § 2(a) for conviction as an aider or abettor.*

(citations omitted).

Although the Supreme Court adopted the *Peoni* standard in *Nye & Nissen* anomalous decisions continue. In *United States v. Monroe*,<sup>168</sup> for example, the District of Columbia Circuit found a defendant guilty of being an accomplice to the possession of cocaine with intent to distribute. An undercover police officer came to the defendant's backyard and bought 0.41 grams of cocaine. When asked if she had any more to sell, the defendant replied that the officer could get more from her buddy, the man sitting next to her. When the man produced more cocaine, both parties were arrested. While the court stated that

[u]nder the 'classic interpretation' of this offense, [i]n order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed,'<sup>169</sup>

the facts of the case hardly amounted to more than a showing of knowledge.<sup>170</sup>

Seventh Circuit jurisprudence also contains anomalous decisions, despite its acceptance of *Peoni*.<sup>171</sup> For example, in *United States v. Fountain*,<sup>172</sup> the defendant was convicted of aiding and abetting the homicide of a security guard when he passed a knife through the cell bars, even though he was indifferent to whether the guard would be killed. A panel of the court led by then-Judge (now-Chief Judge) Richard Posner purported to change the state of mind to "knowledge" for accomplice liability in cases of "major" crimes:

Under the older cases, illustrated by *Backun v. United States* . . . it was enough that the aider and abettor knew the principal's purpose. Although this is still the

168. 990 F.2d 1370 (D.C. Cir. 1993).

169. *Id.* at 1373 (citations omitted) (emphasis added).

170. The court found the defendant guilty of aiding and abetting, since she "procured a customer and served to 'maintain the market' ". *Id.* at 1374. The court did not offer any other evidence to show that the defendant shared in the criminal state of mind of the principal, even though it stated that 18 U.S.C. § 2 "mak[es] one who assists the perpetrator of the crime while sharing the requisite criminal intent liable as a principal." *Id.* *Monroe* is analogous to, but inconsistent with *State v. Gladstone*, 474 P.2d 274 (Wash. 1970), in which the Washington Supreme Court reversed a defendant's conviction as an accomplice after he told an undercover police officer from whom he could buy marijuana and even gave him directions to the house. The Washington Court, adopting Judge Hand's standard of intent, *id.* at 278 ("Learned Hand J., we think, hit the nail squarely . . . in *United States v. Peoni*." ) (citations omitted)), stated, "it would be dangerous precedent indeed to hold that mere communications to the effect that another might or probably would commit a criminal offense amount to aiding and abetting of the offense should it ultimately be committed." *Id.* at 279.

171. See, e.g., *United States v. Beck*, 615 F.2d 441, 448 (7th Cir. 1980) (defendant convicted as an aider and abettor of the illegal export of arms into South Africa after he had corresponded and set up a scheme with the shipper to conceal the fact that the shipments were actually firearms:

The most well-accepted formulation of the standard of proof for aiding and abetting is that expressed by Judge Learned Hand in *United States v. Peoni*. . . . He wrote that the prosecution must show that the defendant 'in some sort associate[d] himself with the venture, that he participate[d] in it as in something he wishes to bring about, [and] that he s[ought] by his action to make it succeed. . . . [T]o prove association, there must [have been] evidence to establish that the defendant shared in the criminal intent of the principal.' (citations omitted).

172. 768 F.2d 790 (7th Cir. 1985) (Posner, J.), *cert. denied*, 475 U.S. 1124 (1986).

test in some *states* . . . , after the Supreme Court in *Nye & Nissen v. United States*, adopted Judge Learned Hand's test—that the aider and abettor 'in some sort associate himself with the venture, that he participate in it as in something he wishes to bring about, that he seek by his action to make it succeed,'—it came to be generally accepted that the aider and abettor must share the principal's purpose in order to be guilty of violating 18 U.S.C. § 2 . . . . The holding of *Backun* itself may have been *superseded*, but a dictum in *Backun*—'One who sells a gun to another knowing that he is buying it to commit a murder, would hardly escape conviction as an accessory to the murder by showing that he received full price for the gun'—makes [a] . . . compelling . . . appeal to common sense.<sup>173</sup>

Judge Posner distinguished between "minor" cases, that is, selling dresses to a woman knowing she will use them for prostitution and "major" cases, that is, selling guns knowing the buyer wants to use them to kill his mother-in law.<sup>174</sup> Of the shopkeeper who sells to the prostitute, he observed, "Little would be gained by imposing criminal liability in such a case. Prostitution, anyway a minor crime, would be but trivially deterred, since the prostitute could easily get her clothes from a shopkeeper ignorant of her occupation."<sup>175</sup> Of the gun dealer, he remarked, imposing liability "would help deter—and perhaps not trivially given public regulation of the sale of guns—a most serious crime."<sup>176</sup> Accordingly, the panel held "that aiding and abetting murder is established by proof beyond a reasonable doubt that the supplier of the murder weapon *knew* the purpose for which it would be used."<sup>177</sup>

Anomalously, *Fountain* is without effect in the Seventh Circuit jurisprudence. In *United States v. Pino-Perez*,<sup>178</sup> where the Circuit *en banc* held that 18 U.S.C. § 2 is

173. *Id.* at 797-98 (citations omitted) (emphasis added).

174. *Id.* at 798.

175. *Id.*

176. *Id.*

177. *Id.* (emphasis added). The panel in *Fountain* rendered its decision despite *Nye & Nissen* and *Beck*. The Seventh Circuit Court Rules, however, require:

A proposed opinion approved by a panel of this court adopting a position which would *overrule a prior decision of this court or create a conflict between or among circuits* shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear in banc the issue of whether the position should be adopted . . . . When the position is adopted by the panel after compliance with this procedure, the opinion, when published, shall contain a footnote worded, depending on the circumstances, in substance as follows: This opinion has been circulated among all judges of this court in regular service. (No judge favored or A majority did not favor) a rehearing in banc on the question of (e.g., overruling *Doe v. Roe*).

7TH CIR. R. 16 (1983) (now Rule 40) (emphasis added). The *Fountain* opinion does not contain such a footnote. No explanation is offered for its deviation from the Supreme Court's teaching, the rest of the circuits, and controlling past Seventh Circuit precedent without consulting with the rest of the Seventh Circuit judges. See *supra* note 50 (discussing *en banc* procedure).

178. 870 F.2d 1230 (7th Cir. 1989) (Posner, J.) (*en banc*).

applicable to the Continuing Criminal Enterprise or "Drug Kingpin" statute,<sup>179</sup> the Court of Appeals, through Chief Judge Posner, observed:

We and other courts have endorsed Judge Learned Hand's definition of aiding and abetting, which requires that the alleged aider and abettor "in some sort associate himself with the venture, that he participate in it as in something he wishes to bring about, that he seek by his action to make it succeed."<sup>180</sup>

Strangely, the uniform jury instructions in use in the Seventh Circuit do *not* reflect the Circuit's own jurisprudence, and their commentary actually confuses the issue. The standard jury instruction for aiding and abetting, formulated by the Committee on Federal Criminal Jury Instructions of the Seventh Circuit, states:

Any person who *knowingly* aids, abets, counsels, commands, induces or procures the commission of a crime is guilty of that crime. However, that person must *knowingly* associate himself with the criminal venture, participate in it, and *try to make it succeed*.<sup>181</sup>

In the commentary after the instruction, however, the Committee states:

[W]hile a high level of activity need not be shown [to find someone guilty of aiding and abetting], there must be some *intentional* active assistance, as

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179. 22 U.S.C. § 848 (1994).

180. *Pino-Perez*, 870 F.2d at 1235. The Court of Appeals elaborated:

The mere fact of leasing a boat to a person known to be a drug trafficker would not be enough to make him guilty of aiding and abetting a drug kingpin. And . . . [o]ne who sells a small—or for that matter a large quantity of drugs to a kingpin is not by virtue of the sale alone an aider and abettor. It depends on what he knows and what he wants: Does he want the kingpin's enterprise to succeed or is the kingpin just another customer? If he does want the enterprise to succeed, there is no anomaly in holding him liable as an aider and abettor.

*Id.* Later Seventh Circuit cases also follow *Peoni*, not *Fountain*. See, e.g., *United States v. Blakenship*, 970 F.2d 283, 286 (7th Cir. 1992) (reversing and remanding defendant's conviction as a co-conspirator to drug manufacturing where he leased a trailer to the drug manufacturer for \$1,000 a day knowing that she intended to manufacture drugs in the trailer; "Judge Hand offered a . . . definition of aiding and abetting in *United States v. Peoni*, and we adopted his approach in *United States v. Pino-Perez*." (citations omitted); *United States v. Giovannetti*, 919 F.2d 1223, 1226 (7th Cir. 1990) (reversing and remanding defendant's conviction for aiding and abetting a gambling enterprise where he rented a room for the enterprise to conduct itself; "Now it is not the law that every time a seller sells something that he knows will be used for an illegal purpose he is guilty of aiding and abetting, let alone of actual participation in the illegal conduct. Aiding and abetting requires more").

181. COMMITTEE ON FEDERAL CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT, FEDERAL CRIMINAL JURY INSTRUCTIONS § 5.08, at 702 (West 1980) (emphasis added). This instruction combines "knowledge" terms with language more consistent with "intent," but it does not instruct the jury that these two terms have different meanings. Interestingly, the Federal Committee on the Operation of the Jury System published Pattern Criminal Jury Instructions that rely on *Beck* in formulating the instruction on accomplice liability:

I have just told you about the crime of [e.g.,: bank robbery]. For you to find someone guilty of [bank robbery], it is not necessary that you find that he actually [robbed the bank] himself. It is enough if he *intentionally* helped someone else [rob the bank].

REPORT OF THE SUBCOMMITTEE ON PATTERN JURY INSTRUCTIONS, COMMITTEE ON THE OPERATION OF THE JURY SYSTEM, JUDICIAL CONFERENCE OF THE UNITED STATES (Federal Judicial Center (1987)) (emphasis added).



distinguished from a mere presence at the scene of the crime or *simple knowledge* that a crime is being committed.<sup>182</sup>

Working with the “knowledge vs. intent” standard for the state of mind for accomplice liability is further complicated by the way the words “knowledge” and “intent” are often misused. For example, in *United States v. Bailey*,<sup>183</sup> the Supreme Court explained the distinction between the two terms: “At common law, crimes generally were classified as requiring either ‘general intent’ or ‘specific intent’. This venerable distinction, however, has been the source of a good deal of confusion.”<sup>184</sup> Not only are the traditional definitions of general and specific intent vague, but the word “intent” is also used as a general purpose synonym for any criminal state of mind.<sup>185</sup>

This ambiguity has led to a movement away from the traditional dichotomy of intent and towards an alternative analysis of mens rea . . . . [T]he most significant, and most esoteric, distinction drawn by this analysis is that between the mental states of “*purpose*” [intent] and “*knowledge*” . . . . [A] person who caused a particular result is said to act *purposefully* [intentionally] if “he *consciously desires* that result, whatever the likelihood of the result happening from his conduct,” while he is said to act *knowingly* if he is *aware* that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.<sup>186</sup>

A prime example of the confused usage of these terms may be found in *United States v. Harris*,<sup>187</sup> where the defendant was convicted of being an accomplice to an armed robbery and an assault with a deadly weapon of two workers at the defendant’s place of employment. The workers were transporting cash for the payroll of the company when they were robbed. The evidence that led to the defendant’s conviction was entirely circumstantial. Combining the evidence that the perpetrator used the defendant’s gun, his car and his apartment, that he robbed the defendant’s place of employment, and that the following day when the company paid the employees by check, the defendant was the only employee who did not pick up his check, the court found that the circumstantial evidence was sufficient to convict the defendant as an accomplice.

The problem with the *Harris* decision is not its result, which is fair enough, but is its use of language. The court stated that “in order to uphold [defendant’s] conviction for aiding and abetting the robbers, there must be evidence to support a finding of guilty *knowledge*”<sup>188</sup> and cited two cases for the proposition. The first,

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182. *Id.* (citing *Beck*, 615 F.2d at 448-49 (emphasis added)).

183. 444 U.S. 394 (1980).

184. *Id.* at 403.

185. *Id.* See also *infra* APPENDIX D (STATE OF MIND) (discussing state of mind).

186. *Id.* at 404 (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 445 (1978)).

187. 435 F.2d 74 (D.C. Cir. 1970), *cert. denied*, 402 U.S. 986 (1971).

188. *Id.* at 88 (emphasis added).

*Bailey v. United States*,<sup>189</sup> reflects the “intent” standard:

[A] sine qua non of aiding and abetting . . . is guilty participation by the accused. . . . In order to aid and abet another to commit a crime it is necessary that a defendant “in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.”<sup>190</sup>

The defendant in *Bailey* was acquitted of being an accomplice of the robbery of a sales clerk because the only evidence of his assistance was his prior conversations with the robber and his presence when the crime occurred. The court stated that “an inference of criminal participation cannot be drawn merely from his presence; a culpable *purpose* is essential.”<sup>191</sup>

Nor does the second case, *White v. United States*,<sup>192</sup> help. In *White*, the defendant was convicted of being an accomplice to the transportation of a stolen automobile in interstate commerce. The defendant lied on a mortgage application by stating that he owned a 1963 Cadillac, requested such a car from the man who eventually arranged its theft and agreed to pay the perpetrator \$800 to get the car. Reflecting the “intent” standard, but speaking in “knowledge” language, the court stated:

To be an aider and abettor requires that a defendant “associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed” . . . . Aiding and abetting implies guilty knowledge.<sup>193</sup>

The court affirmed the defendant’s conviction because “adequate evidence [existed] from which it could be inferred that [the defendant] not only participated in and associated himself with the theft of the automobile and its unlawful interstate transportation, but that he was the actual instigator of the crime.”<sup>194</sup>

Neither the majority nor the dissent in *Harris* showed any awareness of the distinction between “knowledge” and “intent.” The dissent argued that “the basic deficiency in the government’s evidence is that it fails to include proof of any factual element from which it can be concluded that Harris *knowingly* participated in the robbery and sought by his *actions* to make it succeed.”<sup>195</sup> What the courts are apparently doing—without always so saying—is inferring “intent” from

189. 416 F.2d 1110, 1113 (D.C. Cir. 1969).

190. *Id.* at 1113 (quoting *Nye & Nissen*, 336 U.S. at 619).

191. *Id.* (emphasis added). In brief, *Bailey* reflects *Peoni*; it does not hold that “knowledge” is enough for criminal liability for aiding and abetting.

192. 366 F.2d 474 (10th Cir. 1966).

193. *Id.* at 476 (citations omitted).

194. *Id.* Thus, *White* reflects *Peoni*, although *Harris* cites it to support the “knowledge” requirement.

195. *Harris*, 435 F.2d at 92 (MacKinnon, J., dissenting). The dissent continued, “[P]roof of guilty knowledge is an essential element of aiding and abetting. In the words of Learned Hand, it must be proved that the accused have a ‘purposive attitude’ toward the crime.” *Id.* at 93 (quoting *Peoni*, 100 F.2d at 402).

"knowledge" plus a series of acts rendering substantial assistance to the principal in the first degree. In this sense, the courts have not lowered the state of mind necessary for being an accomplice, that is, intent that the crime be committed, but have inferred intent from knowledge in certain standard situations, that is, consciously rendering substantial assistance.

### 3. Conduct

The jurisprudence of accomplice liability uses a number of related words to express its conduct component: "aid and abet" "assistance," "participation" "facilitation," etc.<sup>196</sup> In *Nye & Nissen*, the Supreme Court stated: "Aiding and abetting . . . states a rule of criminal responsibility for acts which one *assists* another in performing."<sup>197</sup> Similarly, the Court described the conduct requirement as "assist" for accomplice liability in *United States v. Williams*,<sup>198</sup> where the defendant unsuccessfully argued that *res judicata* prohibited his trial for perjury because he was convicted in the first trial for being an accomplice to the deprivation of 14th amendment rights: "Aiding and abetting means to *assist* the perpetrator of the crime."<sup>199</sup> On the other hand, in *United States v. Alvarez*,<sup>200</sup> the Fifth Circuit identified the issue a prosecutor faces in proving the conduct requirement for accomplice liability: "When an abettor is prosecuted, the threshold question is: how much does someone have to *contribute* to the crime of another in order to be accountable as an abettor?"<sup>201</sup> Unfortunately, the Court did not answer its own question because the case was prosecuted as a conspiracy; instead, the court observed that "Federal Prosecutors have often sidestepped the necessity of seeking the answer to this question by charging defendants involved in crime with a different criminal offense, joinder in a conspiracy."<sup>202</sup> Finally, while the federal courts of appeals agree that "participation" means conduct designed to aid the venture, language is often included in decisions that indicates that the conduct must be "affirmative," though it is seldom more than dicta. Other times, the courts properly include the concept of omission in their general definitions.<sup>203</sup>

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196. LAFAYE & SCOTT, *supra* note 148, at 576; *see also supra* note 151 (discussing linguistic roots of "aid" and "abet").

197. 336 U.S. at 620 (emphasis added).

198. 341 U.S. 58 (1951).

199. *Id.* at 64. The Court also added that "to be present at a crime is not evidence of guilt as an aider and abettor." *Id.* at 65 n.4 (citations omitted) (emphasis added).

200. 610 F.2d 1250 (5th Cir. 1980), *cert. denied*, 451 U.S. 938 (1981).

201. *Id.* at 1253. Ironically, in *Nye & Nissen*, 336 U.S. at 620, the Court upheld a conviction against a challenge to a conspiracy theory under an alternative aiding and abetting theory.

202. *Alvarez*, 610 F.2d at 1253. In its proposed recodification of federal criminal jurisprudence in 1980, the Senate Judiciary Committee planned to use only the words "aid" and "abet." The Committee defined "abet" to include "induce, procure, and command," and it eliminated the word "counsels" as being redundant with "aids." "Aiding," the Committee reported, "is intended to encompass all forms of assistance, including the giving of advice or counsel with respect to the commission of an offense. S. REP. 96-553 at 74-75 (1980).

203. *See, e.g., United States v. Dolt*, 27 F.3d 235 (6th Cir. 1994) (vacating defendant's sentence as a career

#### 4. Capacity

Some crimes are so defined by statute or common law that they may be committed only by certain persons or classes of persons . . . . As to such crimes,

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offender, where his last conviction was for solicitation under a Florida law that the court distinguished from aiding and abetting;

"In order to establish aiding and abetting, the government must prove that the substantive offense has been committed. Evidence must demonstrate that the defendant committed overt acts or affirmative conduct to further the offense, and intended to facilitate the commission of the crime. Unlike aiding and abetting, the Florida solicitation statute does not require completion or commission of the offense, but rather only that the defendant make some statement which might lead to another person's commission of the crime. The defendant also need not engage in any affirmative conduct designed to aid in the venture. Aiding and abetting is clearly a more serious crime, since the defendant directly participates in a completed crime, whereas the defendant need only encourage or request that another commit the crime to be guilty of solicitation.");

*United States v. Howard*, 13 F.3d 1500, 1502 (11th Cir. 1994) (affirming three defendants' convictions as accomplices of the unauthorized descrambling of satellite cable programming because they sold, as part of their business, electronic descrambling devices modified in such a way as to make them capable of illegally obtaining cable programs;

"The evidence need not show that the defendant participated in every phase of the venture. In this case, the jury was properly instructed on aiding and abetting, and the evidence plainly established each defendant's active participation in and contribution to the activity involving the sale of illegal decryption devices. Because it was not necessary to prove that every defendant was present or played a hands-on role during each of the violations, the convictions must stand.") (citations omitted);

*United States v. Murray*, 988 F.2d 518, 522 (5th Cir. 1993) (affirming defendant's conviction as an accomplice to the transfer of an unregistered firearm because, on behalf of the gun supplier, he brought the gun inside the house for the transfer to take place; "'Participation' means that the defendant engaged in some affirmative conduct designed to aid the venture. Mere presence and association are insufficient to sustain a conviction for aiding and abetting.") (citations omitted); *United States v. Ramos-Rascon*, 8 F.3d 704, 711 (9th Cir. 1993) (reversing defendants' convictions for being an accomplice to possession with intent to distribute cocaine, where the government did not present any evidence that the defendants even knew the drug transaction occurred, that they were more than just present when meetings occurred to discuss the transactions, or that they did anything to help carry out the venture; "Mere participation in a criminal venture is not enough [to prove aiding and abetting]; the government must also show that the defendant 'intentionally assisted in the venture's illegal purpose.' ") (citations omitted); *United States v. Frorup*, 963 F.2d 41, 43 (3d Cir. 1992) (affirming defendant's conviction for aiding and abetting the possession with intent to distribute cocaine, where defendant arranged for an undercover agent to purchase drugs from another by telling him from whom to buy and then brought agent to the named location;

"In order to establish the offense of aiding and abetting, the Government must prove two elements: that the substantive crime has been committed and that the defendant knew of the crime and attempted to facilitate it. Actual or constructive possession need not be shown to justify a conviction for aiding and abetting possession, only 'some affirmative participation which at least encourages the principal offender to commit the offense.' ") (citations omitted);

*United States v. Labat*, 905 F.2d 18, 23 (2d Cir. 1990) (reversing defendant's conviction for being an accomplice to the possession of marijuana with intent to distribute even though the defendant was willing to supply the marijuana to the principal, where the principal actually bought it from someone else;

"To convict a defendant on a theory of aiding and abetting, the government must prove that the underlying crime was committed by a person other than the defendant and that the defendant acted, or failed to act in a way that the law required him to act, with the specific purpose of bringing about

may a person who could not directly commit the offense become criminally liable by acting as an accomplice to another who is within the scope of the definition? The courts have consistently answered this in the affirmative.<sup>204</sup>

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the underlying crime . . . . A general suspicion that an unlawful act may occur is not enough . . . . [A]iding and abetting is not proven unless it is shown that the defendant joined the specific venture, shared in it, and that his efforts contributed to its success.”);

*United States v. Isaksson*, 744 F.2d 574, 578 (7th Cir. 1984) (affirming defendant’s conviction for being an accomplice to the preparation of a false tax return, where he paid some of his employees out of a materials account and not a wages account thus providing them with false W-2 forms that they used to file their personal income tax; “[I]n prosecutions involving aiding and abetting . . . the government is required to prove an overt act designed to aid in the commission of the offense.”); *United States v. Campbell*, 702 F.2d 262, 265 (D.C. Cir. 1983) (affirming district court’s post-verdict acquittal of construction company’s co-founder for being an accomplice of the giving of an illegal gratuity, a household move, to a judge, where nothing in the record linked the defendant to the move; “Although an aider and abettor ‘need not perform the substantive offense, . . . need not know of its details, . . . and need not even be present . . .,’ it must be proven ‘that the defendant consciously assisted the commission of the specific crime in some active way.’ ”) (citations omitted); *United States v. Campa*, 679 F.2d 1006, 1010 (1st Cir. 1982) (affirming defendant’s conviction for being an accomplice of the possession of cocaine with intent to distribute, where defendant made phone calls to obtain the drugs and placed the drug money from the sale in an envelope; “Mere presence at the scene and knowledge that a crime is being committed is generally insufficient to establish aiding and abetting. The government must prove some affirmative participation by the aider and abettor.”) (citations omitted); *United States v. Sacks*, 620 F.2d 239, 241 (10th Cir. 1980) (affirming defendant’s conviction as an accomplice to the distribution of cocaine, where evidence was introduced that he arranged a location for the transaction, ensured the quality of the cocaine and received the money for it;

“[I]t is clear that evidence showing more than presence at the scene of a crime and knowledge that the crime is being committed is necessary to prove aiding and abetting . . . . Defendant’s primary contention is that the evidence is insufficient because it only shows defendant was a knowing spectator; the core of the argument is defendant’s premise that oral communication cannot constitute action or affirmative conduct in furtherance of a crime. In the context of this case the premise is clearly false. By his spoken words, defendant sought to assure completion of the transaction that had been arranged”) (citations omitted);

*United States v. Honeycutt*, 311 F.2d 660, 662 (4th Cir. 1962) (reversing defendant’s conviction for being an accomplice of a gambling ring, where the only evidence against him was that he was in a partnership with the principal in the store where the gambling occurred; “To convict an aider and abettor the prosecution had to show conduct on his part amounting to counselling or other assistance in [the principal’s] interstate criminal activity.”) (citations omitted); *Johnson v. United States*, 195 F.2d 673, 675-76 (8th Cir. 1952) (reversing defendant’s conviction for being an accomplice to the transportation of a stolen vehicle, where, although he accompanied the principal across the border, he was not with the principal when he stole the car nor was he aware at the time of transportation that the car was stolen;

“To be an aider and abetter it must appear that one so far participates in the commission of the crime charged as to be present, actually or constructively, for the purposes of assisting therein. Thus, one who gives aid and comfort, or who commands, advises, instigates or encourages another to commit a crime may be said to be an aider and abetter . . . . As the term ‘aiding and abetting’ implies,

it assumes some participation in the criminal act in furtherance of the common design, either before or at the time the criminal act is committed. It implies some conduct of an affirmative nature and mere negative acquiescence is not sufficient. In fact, it has been held that the mere fact that one is present at the scene of a crime, even though he may be in sympathy with the person committing it, will not render him an aider and abetter.”) (citations omitted).

204. *LAFAVE & SCOTT*, *supra* note 148, at 594. For example, “the crime of rape requires that the unconsented sexual intercourse be by a male, excluding the woman’s husband and (in some jurisdictions) any boy under the age of fourteen . . . . [L]iability . . . will extend [, however,] . . . to another woman, or a boy under fourteen or the victim’s husband who procures or assists another to commit rape.” *Id.*

In 1951, Congress also altered and clarified the language of § 2(a) by adding the words “punishable as.”<sup>205</sup> Accomplices were no longer to be considered as “principals in the first degree” but, rather, were viewed as punishable in the same manner as principals.<sup>206</sup> Section 2(a)’s application beyond those with statutory capacity did not work an innovation in federal criminal jurisprudence. In *Coffin v. United States*,<sup>207</sup> the Supreme Court held the defendants liable as aiders and abettors to the willful misapplication of bank funds, noting that Congress directed the statute at “every president, director, cashier, teller, clerk, or agent of any association [and also at] every person who with like intent aids and abets.”<sup>208</sup> The defendant argued that “no one but an officer or agent [could] be punished as an aider and abettor.”<sup>209</sup> According to the Court, however, “every person who aid[ed] and abet[ted], not being an officer, [would] go unwhipped of justice.”<sup>210</sup> In rejecting the defendant’s argument, the Court stated: “To adopt that construction would destroy the letter and violate the spirit of the law.”<sup>211</sup> The circuit courts of appeal uniformly follow this principle.<sup>212</sup>

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205. Act of October 31, 1951, Pub. L. No. 82-247, 65 Stat. 717 (1951).

206. *Id.* S. REP. NO. 82-1020 at 5 (1951) stated:

This section [was] intended to clarify and make certain the intent to punish aiders and abettors regardless of the fact that they may be incapable of committing the specific violation which they are charged to have aided and abetted. Some criminal statutes of title 18 are limited in terms to officers and employees of the Government, judges, judicial officers, witnesses, officers or employees or persons connected with national banks or member banks.

207. 156 U.S. 432 (1895).

208. *Id.* at 447 (citations omitted).

209. *Id.*

210. *Id.*

211. *Id.* The Court continued:

The assertion that one who is not an officer or who bears not the official relation to the bank cannot, in the nature of things, or abet an official of the bank in the misapplication of funds is an argument which, if sound, should be addressed to the legislature and not the judicial department.

*Id.*

212. See, e.g., *In re Nofziger*, 956 F.2d 287, 290-91 (D.C. Cir. 1992) (private citizen who had never worked for the government charged as an accomplice to the making of prohibited communications by a former government employee to a government department on which he had previously served as an officer; “[T]he law is well-settled that one may be found guilty of aiding and abetting another individual in his violation of a statute that the aider and abettor could not be charged personally with violating . . . The doctrine is of ancient origin.”); *United States v. Smith*, 891 F.2d 703, 710 (9th Cir. 1989) (affirming convictions where defendants, who did not themselves have positions at bank but who were helped by bank officer in scam on the bank, were charged as accomplices to the officer’s false entries into the books of the savings and loan;

“[Defendants’] argument is that the substantive offense was one . . . which could only be committed by an officer, agent or employee of an institution . . . . The person who made the false entries was . . . an officer . . . Hence he could have committed the crime, and the [defendants], although not themselves agents of the Savings and Loan, could have aided and abetted him.”),

*modified on other grounds*, 906 F.2d 385 (9th Cir.), *cert. denied*, 498 U.S. 811 (1990); *United States v. Odom*, 736 F.2d 150, 152 (5th Cir. 1984) (affirming conviction of union president charged as an accomplice to his employer-construction company’s failure to make contributions to an employee benefit plan in violation of

### 5. Exceptions

"There will be some Federal crimes where it is desirable that a person who would otherwise be an accomplice because of his aid and culpability should not be liable for the particular offense."<sup>213</sup> Three such exceptions "to the general principle that a person who assists or encourages a crime is also guilty as an accomplice" are commonly thought to exist in federal criminal jurisprudence.<sup>214</sup>

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ERISA, where defendant persuaded the employer not to make the contributions;

"There is no requirement in either statute that an aider and abettor be an employer to fall within their proscriptions, nor would such a limitation comport with the general precepts of aider and abettor liability . . . [A] defendant who is not in the class of persons to whom a substantive statute is directed may still be guilty of aiding and abetting for causing, inducing, or procuring the statutory violation.") (citation omitted);

United States v. Southard, 700 F.2d 1, 20 (1st Cir.), *cert. denied*, 464 U.S. 823 (1983) (defendants, who were not in the business of betting or wagering, were charged as accomplices to the use of wire communications to transmit bets in interstate commerce by a person engaged in the business of betting or wagering; "The question, . . . is . . . whether a person 'not in the business of betting or wagering' can be found guilty of assisting one who is. We think it clear that he can."); United States v. Standefer, 610 F.2d 1076, 1085 (3d Cir. 1979), *aff'd*, 447 U.S. 10 (1980) (court properly charged defendant as an aider and abettor to an Internal Revenue Service officer's receipt of illegal gratuities, where defendant furnished the officer with five paid golfing vacations;

"A . . . concern that has been expressed is that the substantive criminal statute under which [defendant] was indicted . . . is limited in its coverage to officers and employees of the United States. [Defendant is] a private citizen. . . . 18 U.S.C. § 2(a) may be used to reach one who could not be indicted as a principal . . . [and thus] despite his private status, [defendant] may not be heard to challenge his conviction on this ground.");

United States v. Tokoph, 514 F.2d 597, 602 (10th Cir. 1975) (defendant, who paid a loan officer of a bank to give him unapproved loans, charged as an accomplice to the bank officer's receipt of the kickback;

"Appellant contends he cannot be found guilty of aiding and abetting because he was not a bank officer, director, employee, agent or attorney . . . . This argument ignores the clear intent of 18 U.S.C. § 2 to reach appellant's acts . . . . It has long been recognized that although 'a defendant was incompetent to commit the offense as principal by reason of not being of a particular age, sex, condition, or class, he may, nevertheless, be punished as procurer or abettor.' ") (citations omitted);

United States v. Giordano, 489 F.2d 327, 330 (2d Cir. 1973) (defendants charged as accomplices to the willful misapplication of bank funds by bank officers through a kiting scheme even though they were not bank officers; "The depositor, not being 'connected in any capacity' with the bank cannot be guilty of violating 18 U.S.C. § 656 as a principal. . . . He can, however, be charged as an accessory, under 18 U.S.C. § 2.") (citations omitted); Haggerty v. United States, 5 F.2d 224, 225 (7th Cir. 1925) (affirming defendant's conviction, where defendant United States Prohibition Agent charged as an accomplice to another's impersonation of a prohibition agent in order to demand valuables from others;

"[E]ven though he may have been incapable of committing the crime . . . , he was not incapable of aiding and abetting another in the commission of the crime . . . . Before the statute aiders and abettors of others in the commission of crime were punishable as such, whether or not they were themselves capable of committing the principal crime.") (citations omitted).

213. I NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 157 (1970) [hereinafter 1970 WORKING PAPERS].

214. LAFAYE & SCOTT, *supra* note 148, at 595.

“[N]ot every substantive crime is susceptible to an aiding and abetting charge. The question is whether [the statute] falls within one of the exceptions to the general rule that aiding and abetting goes hand-in-glove with the commission of a substantive crime.”<sup>215</sup> The exceptions, too, are not necessarily mutually exclusive.

“The first exception is that the victim of a crime may not be indicted as an aider or abettor even if his conduct significantly assisted in the commission of the crime.”<sup>216</sup> When they adopted this exception, the drafters of the Model Penal Code explained:

It seems clear that the victim of a crime should not be held as an accomplice in its perpetration, even though his conduct in a sense may have assisted in the commission of the crime and the elements of complicity previously defined may technically exist. The businessman who yields to the extortion of a racketeer, the parent who pays ransom to the kidnapper, may be unwise or may even be thought immoral; to view them as involved in the commission of the crime confounds the policy embodied in the prohibition.<sup>217</sup>

“The next exception embraces criminal statutes enacted to protect a certain group of persons thought to be in need of special protection. Accomplice liability will not be imposed upon the protected group absent an affirmative legislative policy to include them as aiders and abettors.”<sup>218</sup> The Supreme Court followed this approach in *Gebardi v. United States*,<sup>219</sup> where a woman consented to her transportation from one state to another for the purposes of prostitution, but the

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215. *Southard*, 700 F.2d at 19.

216. *Id.*

217. ALI, COMMENTARIES, *supra* note 148, at 323-324. *But see* *United States v. Spitler*, 800 F.2d 1267, 1275-76 (4th Cir. 1986) (defendant inspector of highway projects convicted as an accomplice even though the Chief of the Highway Administration extorted guns and jewelry from his company because from this extortion he gained approval from the Chief to bill the Highway Administration for unworked hours:

[Defendant] contends that as a victim of . . . [the] extortion he could not, as a matter of law, be convicted as an aider and abettor . . . to the extortion merely by virtue of his acquiescence. . . . When an individual protected by such legislation exhibits conduct more active than mere acquiescence, however, he or she may depart the realm of a victim and may unquestionably be subject to conviction for aiding and abetting.).

218. *Southard*, 700 F.2d at 19.

219. 287 U.S. 112, 121-22 (1932) (citing *Queen v. Tyrell*, 1 Q.B. 710 (1894) (statutory rape: victim exclusion)). The victim exclusion rule, however, is not followed in all cases; its application remains in each instance a question of policy. It is not, for example, typically followed in the antitrust field. *See, e.g.*, *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 142 (1968) (antitrust: plaintiff may properly allege a conspiracy between a manufacturer and an acquiescing franchise dealer); *Albrecht v. Herald Co.*, 390 U.S. 145, 150 & n.6 (1968) (same); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 45 (1960) (same); *United States v. Paramount Pictures*, 334 U.S. 131, 161 (1948) (antitrust: “acquiescence in an illegal scheme is as much a violation . . . as the creation and promotion of one”).

On the application of “victim exclusion” in a reverse mode, see *Roma Construction Co. v. aRusso*, 96 F.3d 566 (1st Cir. 1996) (considering the holding of the district court that a plaintiff under RICO had to be an “innocent victim”).



Court did not hold her liable as an accomplice.<sup>220</sup>

The final exception to accomplice liability . . . occurs when the crime is so defined that participation by another is necessary to its commission. The rationale is that the legislature, by specifying the kind of individual who is to be found guilty when participating in a transaction necessarily involving one or more other persons, must not have intended to include participation by others in the offense as a crime. This exception applies even though the statute was not intended to protect the other participants.<sup>221</sup>

The Supreme Court followed this approach in *United States v. Farrar*,<sup>222</sup> where the court was unwilling to convict a purchaser of alcohol for aiding and abetting the sale of the alcohol in violation of the National Prohibition Act.<sup>223</sup>

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220. The Court observed:

Transportation of a woman or girl whether with or without her consent, or causing or aiding it, or furthering it in any of the specified ways, are the acts punished, when done with a purpose which is immoral within the meaning of the law. . . . The act does not punish the woman for transporting herself; it contemplates two persons—one to transport and the woman or girl to be transported. For the woman to fall within the ban of the statute she must, at the least, 'aid or assist' some one else in transporting or in procuring transportation for herself. But such aid and assistance must . . . be more than mere agreement on her part to the transportation and its immoral purpose. For the statute is drawn to include those cases in which the woman consents to her own transportation. Yet it does not specifically impose any penalty upon her, although it deals in detail with the person by whom she is transported. In applying this criminal statute we cannot infer that the mere acquiescence of the woman transported was intended to be condemned by the general language punishing those who aid and assist the transporter.

287 U.S. at 118 (citations omitted); see also *United States v. Harris*, 959 F.2d 246, 262-63 (D.C. Cir.) (Court would not have convicted defendants as accomplices to the unlawful use of juveniles in drug trafficking had they adduced evidence at trial that they were under 18 and thus part of the class to be protected. The statute:

"manifests Congress" intent not only to limit punishment to persons over the age of 18, but also to protect persons under 18. Convicting juveniles on an aiding and abetting theory would subvert that intent because it would result in punishment of the very class of persons whom [the statute] was designed to protect. . . . [O]ne recognized exception to the general rule "embraces criminal statutes enacted to protect a certain group of persons thought to be in need of special protection.")

(citations omitted), *cert. denied*, 506 U.S. 932 (1992).

221. *Southard*, 700 F.2d at 20.

What is common to these cases . . . is that the question is before the legislature when it defines the individual offense involved. No one can draft a prohibition of adultery without awareness that two parties to the conduct necessarily will be involved. . . . [S]ince th[is] exception is confined to conduct 'inevitably incident to' the commission of the crime, the problem inescapably presents itself in defining the crime."

ALI, COMMENTARIES, *supra* note 148, at 325.

222. 281 U.S. 624 (1930).

223. The Court observed:

[I]n the absence of an express statutory provision to the contrary, the purchaser of intoxicating liquor, the sale of which was prohibited, was guilty of no offense. . . . Probably it was thought more important to preserve the complete freedom of the purchaser to testify against the seller than to punish him for making the purchase. However that may be, it is fair to assume that Congress, when

The resolution of the possible application of one or more of these exceptions is seldom easy. Currently, the application of § 2 to the Continuing Criminal Enterprise statute<sup>224</sup> is unresolved. In *United States v. Ambrose*,<sup>225</sup> Judge (now-Chief Judge) Richard Posner, writing for the Seventh Circuit, explained the problems in meshing the two provisions: "[T]he government concedes, with respect to those whom the kingpin organizes, supervises, or manages," that "Congress . . . could not have intended to subject [them] to equivalent penalties."<sup>226</sup> "When a statute reveals *on its face*, as [this statute] does, the legislators' purpose to make one class of persons punishable more heavily than another, a court will not defeat that purpose by applying the general aiding and abetting statute to the second class."<sup>227</sup> Nevertheless, the defendants in *Ambrose* were not people who the kingpin of the drug enterprise organized; rather, they were police officers who provided protection and services to the kingpin. Thus, the court "agree[d] with the government that the defendants [could] be punished as aiders

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it came to pass the Prohibition Act . . . deliberately and designedly omitted to impose upon the purchaser of liquor for beverage purposes any criminal liability.

*Id.* at 634. Compare *United States v. Shear*, 962 F.2d 488, 493-94 (5th Cir. 1992) (supervisor of utility company not held liable for being an accomplice to the company's violation of OSHA standards that resulted in the death of an employee;

The issue of employee aider and abettor liability for [OSHA] violations partakes of two of the exceptions . . . Employees of OSHA-covered employers are clearly members of the particular class for whose special protection OSHA was enacted. Moreover, while it is theoretically possible that a covered employer could violate [the statute] without being aided or abetted by one or more of his or its employees, Congress must have realized that the overwhelming majority of . . . violations would be committed through the actions of employees of the covered employer.")

(citations omitted), and *United States v. Doig*, 950 F.2d 411, 412-413 (7th Cir. 1991) (employee of corporation acquitted of charge of being an accomplice to his corporation's OSHA violations after an explosion killing three people occurred in a tunnel project he managed;

Generally, the provisions of § 2(a) apply automatically to every criminal offense. . . . [T]here must be 'an affirmative legislative policy' to create an exemption from the ordinary rules of accessorial liability. . . . In this case, we believe that the affirmative legislative policy placing the onus of workplace safety upon employers precludes finding that an employee may aid and abet his employer's criminal OSHA violation.")

(citations omitted), with *United States v. Falletta*, 523 F.2d 1198, 1200 (5th Cir. 1975) (defendant convicted of being an accomplice to the receipt, possession and transportation of a firearm in interstate commerce by a convicted felon because he furnished the felon with the firearm even though the statute was not directed at suppliers;

It appears to us that Congress did not focus clearly on the 'receiving' aspect of this statute and therefore did not go through the thought processes [defendant] ascribes to it. . . . Since possession was the real focus of attention, it is likely that Congress did not confront the issue presented in the instant case. . . . Under these circumstances we cannot find, as *Gebardi* did, an 'affirmative legislative policy' to create an exemption from the ordinary rules of accessorial liability.).

224. 21 U.S.C. § 848 (1994).

225. 740 F.2d 505 (7th Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985).

226. *Id.* at 507.

227. *Id.* at 508 (emphasis added).

and abettors of kingpins.”<sup>228</sup> Judge Posner, however, worried that the kingpin’s “lowliest accomplices—mixers, runners, look-outs—would be subject to the same punishment as he, since the aider and abettor statute . . . allows the aider and abettor to be punished as a principal.”<sup>229</sup> Thus, the Seventh Circuit, over a dissent written by Judge Harlington Woods, held that “in sentencing an aider and abettor the district judge [was] not bound by the minimum-sentence provisions in the kingpin statute.”<sup>230</sup>

Five years later, in *Pino-Perez*, Judge Posner reevaluated and overruled his own opinion in *Ambrose*, where he had held that “the persons supervised by the kingpin cannot be punished as aiders and abettors.”<sup>231</sup> Judge Posner argued that “[p]ersons who assist a kingpin but are not supervised, managed, or organized by him d[id] not fit any of . . . [the] exceptions, and [he] [was] reluctant to create a fourth.”<sup>232</sup> After weighing the issue again, however, Judge Posner was convinced that by “simply lopping off a minimum statutory penalty for one class of violators (aiders and abettors) . . . [he had] exceed[ed] the prudent bounds of judicial creativity.”<sup>233</sup>

Three reasons shaped the Seventh Circuit’s *en banc* decision in *Pino-Perez*. First,

[Section] 2(a) does not contain its own schedule of punishments but instead makes the aider and abettor punishable *as a principal* for the offense that he aided and abetted. That is, punishment is imposed under the statute creating that offense. Here that is the kingpin statute, which imposes a minimum penalty applicable to everyone punishable under the statute—and an aider and abettor is punishable under the statute creating the offense he has aided and abetted and under no other statute.<sup>234</sup>

Second, Judge Posner was no longer worried that people undeserving of criminal punishment would receive it because “Judge Hand’s definition of aider and abettor . . . implies a [full] engagement with the kingpin’s activities.”<sup>235</sup> “Third, and related, in no reported case ha[d] the participation of the aider and abettor been so meager relative to the kingpin’s that subjecting him to the minimum penalty in the kingpin statute would be savage or incongruous.”<sup>236</sup> Realizing the difficulties in meshing these two statutes, Judge Posner stated: “Congress may want to give attention to the problem of subjecting aiders and abettors to stiff mandatory

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228. *Id.* at 510.

229. *Id.* at 507-08.

230. *Id.* at 510.

231. *Pino-Perez*, 870 F.2d at 1231.

232. *Id.* at 1232.

233. *Id.* at 1237.

234. *Id.* at 1236-7 (emphasis added).

235. *Id.* at 1237.

236. *Id.*

minimum criminal penalties, although [h]e recognize[d] . . . that lenity for drug offenders [was] not high on the current list of national priorities."<sup>237</sup> Thus, at least in the Seventh Circuit, an accomplice to a drug kingpin is punishable in the same manner as the kingpin himself.

The Second Circuit, on the other hand, adopted the opposite view in *United States v. Amen*,<sup>238</sup> where the court reversed the defendant's conviction for being an accomplice to a drug kingpin. The defendant was not an employee of the enterprise; rather, he was a fellow inmate of the kingpin who helped the kingpin keep his business going while in prison by placing phone calls to his own subordinates outside of the prison asking them to perform certain tasks. The Second Circuit agreed with the earlier opinion of the Seventh Circuit in *Ambrose*, stating that "employees of a CCE cannot be punished for aiding and abetting the head of the enterprise."<sup>239</sup> Nevertheless, the Second Circuit disagreed that "non-employees who knowingly provide direct assistance to the head of the organization in supervising and operating the criminal enterprise can be . . . punished [under the kingpin statute]."<sup>240</sup> The *Amen* court stated, "[w]hen Congress assigns guilt to only one type of participant in a transaction, it intends to leave the others unpunished for the offense. Here Congress defined the offense as leadership of the enterprise, necessarily excluding those who do not lead."<sup>241</sup> According to the Second Circuit:

While the legislative history makes no mention of aiders and abettors, it makes it clear that the purpose of making CCE a new offense rather than leaving it as sentence enhancement was not to catch in the CCE net those who aided and abetted the supervisors' activities, but to correct its possible constitutional defects.<sup>242</sup>

The Second Circuit stood firm in *United States v. Benevento*,<sup>243</sup> where it stated, "aiding and abetting liability, pursuant to 18 U.S.C. § 2, is not available in prosecutions under [the kingpin statute]."<sup>244</sup>

Writing for a majority of the Seventh Circuit in *Pino-Perez*, Judge Posner

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237. *Id.* State legislatures are sometimes more sensitive to the possibility of creating incongruities. See *infra* note 934 (discussing leadership of organized crime provision and accomplice liability).

238. 831 F.2d 373 (2d Cir. 1987), *cert. denied*, 485 U.S. 1021 (1988).

239. *Id.* at 381.

240. *Id.*

241. *Id.* (citations omitted).

242. *Id.* The court stressed that the drafters of the act wrote it "primarily [as] a sentencing enhancement provision," and it only became a separate offense because the "Association of the Bar of the City of New York and others objected that these provisions allowed sentencing to be imposed without providing a defendant with an opportunity to cross-examine persons providing information as to the continuing criminal offense." *Id.* at 381-82 (citations omitted). Thus, the court held "that to be punished under [the kingpin statute] one must meet all the requirements for a conviction under [the statute]." *Id.* at 382.

243. 836 F.2d 60 (2d Cir. 1987), *cert. denied*, 486 U.S. 1043 (1988).

244. *Id.* at 71.

criticized the Second Circuit's holdings in *Amen* and *Benevento*. First, he stated that:

No cases other than *Amen* and *Benevento* hold [§ ] 2(a) totally inapplicable to a federal criminal statute. Not every accomplice in the commission of a federal criminal offense is an aider and abettor, but until *Amen* every aider and abettor of a federal criminal offense had been thought punishable for the offense as a principal by virtue of section 2(a).<sup>245</sup>

Second, he argued:

True, it was not Congress's *purpose* in making the operation of a continuing criminal enterprise a separate offense to bring section 2(a) into play. But such is never Congress's purpose in creating a new offense. Congress doesn't have to think about aider and abettor liability when it passes a new criminal statute, because section 2(a) attaches automatically. The question is not whether section 2(a) is applicable—it always is.<sup>246</sup>

Last, he explained, “[u]ntil *Amen* the presumption with regard to aiding and abetting had been different. There had to be “ ‘an affirmative legislative policy’ to create an exemption from the ordinary rules of accessorial liability.” Doubt about Congress's intentions was resolved in favor of aider and abettor liability.<sup>247</sup>

In *United States v. Miskinis*,<sup>248</sup> the Ninth Circuit noted the conflict, but declined to choose sides. In *Miskinis*, the defendant was charged as a kingpin himself (not an aider and abettor) because he supplied drug manufacturing chemicals to virtually every manufacturer in the area. The court acknowledged the two sides of the debate established between the circuits:

While we have considerable difficulty with the approach adopted by the Seventh Circuit, there is no need to decide the . . . question here. As the government points out, [defendant] was charged and convicted as a kingpin, not as an aider and abettor of a kingpin. . . . We . . . hold that [the kingpin statute] may be applied to one whose criminal conduct consists solely of aiding and abetting the criminal conduct of others, if that person is otherwise a kingpin in his own right, and if the criminal conduct aided or abetted would itself qualify under that section.<sup>249</sup>

Thus, the Ninth Circuit only held that a person who was a member of the class capable of violating the statute in his own right could be charged as an aider and abettor; it did not address the issue of whether a person who was not a member of

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245. *Pino-Perez*, 870 F.2d at 1233.

246. *Id.* (emphasis added).

247. *Id.* at 1234 (quoting *Falletta*, 535 F.2d at 1200).

248. 966 F.2d 1263 (9th Cir. 1992).

249. *Id.* at 1267-68.

the class could be charged, although it did express its reservations.<sup>250</sup>

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250. In *United States v. Hill*, 55 F.3d 1197 (6th Cir. 1995), the Court held that 18 U.S.C. § 2 applies to 18 U.S.C. § 1955, stating that an accomplice must possess knowledge of the general nature and of scope of the illegal gambling business and take action with intent to assist the principals in the conduct of the business. *Id.* at 1202. Chief Judge Merritt undertook a reexamination of the issue of accomplice liability in the context of complex federal offenses and observed:

As the number of complex criminal statutory crimes has proliferated over the last 30 years, and as the government has attempted to expand the net of criminal liability under them by charging accomplices in addition to principals, the case law and therefore the theory of federal accomplice liability has fallen into some disarray. Even in the days of relatively simple crimes at common law and in earlier federal statutes, the various theories of accomplice liability were often difficult to apply. In this new era of "predicate offenses" with multiple "ancillary conditions" and mandatory and other sentencing enhancements, the new complexity of the statutes is causing disparate results based on conflicting ideas of accomplice liability.

*Id.* at 1200. He then noted the split between *Amen* and *Pino-Perez* and agreed with Sharon C. Lynch, *Drug Kingpins and Their Helpers: Accomplice Liability Under 21 U.S.C. Section 848*, 58 U. CHI. L. REV. 391, 414 (1991): "[C]ourts need to adopt a more careful approach which neither results in a wholesale rejection of accomplice liability nor fails to define the [state of mind] element necessary to aid in the violation of each complex statutory crime." *Hill*, 55 F.3d at 1200. Mere intent to aid with limited knowledge was not enough; responsibility could only be based on intent to aid in the conduct of the business. *See also* *United States v. Herrera*, 23 F.3d 74, 75 n.2 (4th Cir. 1994) (§ 848 issue noted, but not resolved); *United States v. Simpson*, 979 F.2d 1282, 1286 (8th Cir. 1992) (defendant convicted as an accomplice in the use of a firearm in the commission of a violent felony, a crime that imposes a five-year mandatory minimum sentence; "[T]he statute creating liability for aiders and abettors, 18 U.S.C. § 2, provides that the aider and abettor is punishable as a principal. Thus by aiding and abetting the . . . offense, [defendant] in effect has committed it herself. She stands in the shoes of the principal, and therefore is subject to the mandatory minimum."), *cert. denied*, 507 U.S. 943 (1993); *United States v. Adams*, 914 F.2d 1404, 1407 (10th Cir. 1990) (defendant convicted of aiding and abetting the possession of 50 grams or more of a substance with cocaine base and sentenced for 20 years under statute that imposes a mandatory minimum sentence of 10 years for first time offenders and of 20 years for anyone with a prior drug offense;

[T]he ancient common law distinction between aiders and abettors, on the one hand, and principals, on the other, is for all practical purposes abolished. All participants are to be treated as principals. Liability as a principal results 'automatically', as Judge Posner pointed out in *U.S. v. Pino-Perez*, whenever a new criminal statute has been enacted since 1909. The sentencing court's range of discretion with respect to all the participants is therefore the same. And where there is a mandatory minimum sentence applicable such range of discretion is non-existent or zero.)

(citation omitted), *cert. denied*, 498 U.S. 1015 (1990).

The National Commission for Reform of Federal Criminal Laws recommended that a section expressly recognizing the well-recognized exceptions be added to the accomplice provisions of its proposed code. The recommended provision stated: "A person is not liable under this subsection for the conduct of another person when he is either expressly or by implication made not accountable for such conduct by the statute defining the offense or related provisions, because he is a victim of the offense or otherwise." NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT-PROPOSED NEW FEDERAL CRIMINAL CODE, § 401 (1971). The members of the Commission felt that "the accomplice provision should not conflict with such explicit exemptions" as could be "found in the organized crime and promoting prostitution drafts proposed for the new Code, where a more severe penalty is to be available to leaders in the criminal enterprise but not to everyone who aids them." The promoting prostitution section expressly proposed a stiffer penalty on the person who runs the house rather than mere workers. *See id.*, § 1842(2) ("Grading. The offense is a . . . felony . . . if it is under paragraph (a) and the actor owns controls, manages or otherwise supervises the prostitution business or house of prostitution. Otherwise the offense is a Class A misdemeanor.") The organized crime draft was not a separate offense, but merely a section of the sentencing provisions constituting a higher sentence for organized crime leaders. *See id.*, § 3202(b) and (d) (the offender received a higher sentence if he "committed such a felony as part

### *C. Criminal Accomplice Liability: 18 U.S.C. § 2(b)*

#### *1. Introduction*

In 1948, Congress added to Title 18, § 2(b), which reads: "whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such."<sup>251</sup> The reason that Congress added § 2(b) was to make:

clear the legislative intent to punish as a principal . . . anyone who causes the doing of an act which if done by him directly would render him guilty of an offense against the United States. It removes all doubt that one who puts in motion or assists in the illegal enterprise or causes the commission of an indispensable element of the offense by an innocent agent or instrumentality, is guilty as a principal even though he intentionally refrained from the direct act constituting the completed offense.<sup>252</sup>

In 1951, Congress amended § 2(b). First, it added an explicit state of mind requirement; the defendant must "willfully cause[] an act to be done."<sup>253</sup> Second, it added the words "or another" clarifying that the statute was not—and never was—limited to persons capable of committing the offense.<sup>254</sup> Since 1951, when applying 18 U.S.C. § 2(b) to a statute, the courts must consider three separate elements: "willfully," "cause," and "or another."

#### *2. State of Mind*

The course of judicial decisions on the meaning of "willfully" does not run

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of a pattern of criminal conduct which constituted a substantial source of his income, and in which he manifested special skill or expertise" or who "committed such felony in furtherance of, a conspiracy with three or more other persons to engage in a pattern of criminal activity and he did, or agreed that he would, initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or conduct, or give or receive a bribe or use force as all or part of such conduct.") When it reported out its proposed code, the Senate Judiciary Committee did not include the exemption, "since the question of who constitutes a 'victim' and other issues of implicit statutory inclusions from complicitous liability are best left to case by case determination." S. REP. NO. 96-553 at 553 (1980).

251. 62 Stat. 684 (1948).

252. H.R. REP. NO. 80-304 (1948) (§ 2(b) reflected existing jurisprudence). *See, e.g.*, *United States v. Hodorowicz*, 105 F.2d 218, 220 (7th Cir.), *cert. denied*, 308 U.S. 584 (1939) (defendant charged with causing undercover agents to unlawfully possess distilled spirits since they sold the spirits without revenue stamps; "Under . . . [§ 2], anyone who assists in the commission of a crime may be charged directly with the commission of the crime."); *United States v. Giles*, 300 U.S. 41, 48-49 (1937) (bank teller convicted of causing the making of a false entry in the book of a national bank after he withheld cash deposits which resulted in the bookkeeper entering false balances on the ledger; "[t]o hold the statute broad enough to include deliberate action from which a false entry by an innocent intermediary necessarily follows, gives to the words employed their fair meaning and is in accord with the evident intent of Congress."); *Ruthenburg v. United States*, 245 U.S. 480, 483 (1918) (defendant convicted for causing his co-defendant to fail to register for the draft; "[t]he indictment, therefore, charged but one offense—the refusal of [the man] to register—plaintiffs in error being charged as principals in procuring such refusal.").

253. 18 U.S.C. § 2(b) (1994).

254. *Id.*

straight.<sup>255</sup> Ironically, Congress added “willfully” to § 2(b) after criticism from Judge Learned Hand that no state of mind was expressed on the face of the statute.<sup>256</sup> In *United States v. Chiarella*,<sup>257</sup> the Second Circuit reversed a conviction where the district court instructed the jury that the defendant could be found guilty “if the ‘crime or crimes charged . . . resulted from his’ ‘words and actions’; a person would be a principal, if ‘he caused an act to be done which if directly performed by him would be an offense.’ ”<sup>258</sup> Judge Hand reversed the conviction on the basis of erroneous jury instructions that allowed the jury to convict the defendant regardless of his state of mind. Judge Hand noted that “before the amendment of Sec. 2 in 1948, the last and authoritative expression as to what constituted criminal liability was [*Nye & Nissen*].”<sup>259</sup> Because *Nye & Nissen* adopted an intent standard for liability under § 2(a), Judge Hand found “it very hard to believe that [§ 2(b)] really intended so drastically to enlarge criminal liability, though [he] conceded that it is difficult to see what it meant, if it did not mean just that.”<sup>260</sup> Thus, Judge Hand concluded that he could not justifiably hold that § 2(b) did *not* require a state of mind, when the Supreme Court held that § 2(a) required proof of *intent*. He stated:

“[C]ausing an act to be done” covers any acts which are necessary steps in the events that result in the crime; . . . , though we limit the steps to those which the actor knows to be likely so to result; for, even with that limitation there are many situations in which one may ‘cause’ the crime, and yet not ‘abet,’ ‘aid’ or ‘procure’ its commission.<sup>261</sup>

Because “causing” carries with it a larger category of actions than aiding and abetting, Judge Hand posited that Congress did not impose a lesser state of mind element; if that were not the case, § 2(b) would swallow up § 2(a). One year later, Congress added the word “willfully” to the statute. Because Congress did so as a result of Judge Hand’s criticism in *Chiarella*, arguably “willfully” carried with it the same state of mind in § 2(a), as Judge Hand suggested it did, that is, “intent.”

Judge Hand reiterated his point in *United States v. Paglia*.<sup>262</sup> In *Paglia*, the defendant was indicted and convicted of causing the transportation in interstate commerce of counterfeit American Express cheques; he cashed them at a bank in Cleveland and the bank sent them back to New York for collection. Judge Hand stated:

Now it is quite true that when he cashed the cheques [he] knew, or at least he had every reason to suppose, that the result would be their return to New York

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255. See 1970 WORKING PAPERS, *supra* note 213, at 148 (extended discussion of “willfulness”).

256. *Id.* at 154 n.2 (citing *United States v. Chiarella*, 184 F.2d 903 (2d Cir. 1950), *rev’d on other grounds*, 341 U.S. 946 (1951)).

257. 184 F.2d 903 (2d Cir. 1950), *rev’d on other grounds*, 341 U.S. 946 (1951).

258. 184 F.2d at 909.

259. *Id.*

260. *Id.*

261. *Id.*

262. 190 F.2d 445 (2d Cir. 1951), *overruled by* *United States v. Taylor*, 217 F.2d 399 (2d Cir. 1954).



... [This] will not suffice to establish a criminal liability, because an accessory must make the venture his own; the crime must be a fulfillment in some degree of an enterprise which he has adopted as his; his act must be in realization of his purpose. [The cheques' return] was a matter of entire indifference to [him]; indeed, it would have suited his purposes better, had they been lost or destroyed as soon as he got the money, for that would have made detection more difficult.<sup>263</sup>

Thus, Judge Hand did not hold the defendant liable for the cheques' transportation back to New York because the defendant did not "intend" that result, and, as he stated in *Chiarella*, "18 U.S.C. § 2(b) does not enlarge criminal liability."<sup>264</sup>

Subsequently, in *United States v. Taylor*,<sup>265</sup> Judge Hand confessed that he had misconstrued § 2(b) and he was compelled to overrule his own decision in *Paglia*. In *United States v. Sheridan*,<sup>266</sup> the Supreme Court held a defendant liable because he "knew" that a forged check drawn on a Missouri bank and cashed in Michigan would cross state lines in clearance. The language of the substantive statute, which rendered criminal the transportation of a forged check in interstate commerce, contained the element "with unlawful or fraudulent intent."<sup>267</sup> The Court held that this statutory language guaranteed that it would reach those who *knowingly* transported the forbidden articles, and Judge Hand observed:

[As] broad as this [language] was, it was sufficient for the purpose of excluding innocent transportation. We do not think it was also intended to safeguard the counterfeiter or professional forger, simply because the transportation alleged and proved does not aid him initially in securing the possession of the proceeds of his fraudulent dispositions. To take this view would nullify much of the amendment's intended effectiveness.<sup>268</sup>

In *Taylor*, Judge Hand cited *Sheridan* for this proposition and overruled *Paglia*, holding that "[*Sheridan*'s] interpretation was authoritative upon us when we decided *United States v. Paglia*, but unfortunately, although it had been rendered more than four years before, we did not learn of it. We now recognize our error, and overrule our decision."<sup>269</sup>

In fact, the Supreme Court's decision in *Sheridan* was inconsistent with its earlier decision in *United States v. Kenofsky*,<sup>270</sup> where the Court affirmed the defendant's conviction for "causing" a falsified death certificate for a fraudulent insurance claim to be sent through the mail because he gave it to his superintendent

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263. *Id.* at 448 (citations omitted).

264. *Id.*

265. 217 F.2d 397 (2d Cir. 1954).

266. 329 U.S. 379 (1946).

267. *Id.* at 390.

268. *Id.*

269. *Taylor*, 217 F.2d at 399 (citation omitted).

270. 243 U.S. 440 (1917).

to mail. The Court stated that the defendant "deliberately calculated the effect of giving the false proofs to his superior officer; and the effect followed, demonstrating the efficacy of his selection of means."<sup>271</sup>

Today, the required state of mind under § 2(b) is not reflected in either *Kenofsky* or *Sheridan*. In an opinion by Chief Justice Earl Warren, the Court greatly confused the standard of liability in *Pereira v. United States*,<sup>272</sup> without overruling *Sheridan* or *Kenofsky*. In *Pereira*, after being tricked into investing in a hotel on behalf of the defendant, the defendant's wife withdrew a check for \$35,000 in Los Angeles, which she then gave to the defendant. The defendant endorsed the check in Los Angeles for deposit in a Texas bank account and then stole the money from her. He was subsequently charged under the mail fraud statute and the National Stolen Property Act. Affirming the defendant's mail fraud conviction, the Court held: "Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used."<sup>273</sup> The Court stated that its ruling that the proper state of mind for "causing" a mailing was "reasonably foreseeable," although *Kenofsky* had held that the state of mind was *intent*. The Court then cited *Sheridan* for its holding that the proper state of mind for "causing" a use in interstate commerce was "intent," although *Sheridan* held that the state of mind was *knowledge*.<sup>274</sup> The circuit courts today reflect the confusion found in *Pereira*.<sup>275</sup>

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271. *Id.* at 443. *Sheridan* did not deprive *Kenofsky* of all vitality. The Ninth Circuit used it to interpret "willfully" to mean "intentional," as had the Supreme Court, in *United States v. Markee*, 425 F.2d 1043, 1046 (9th Cir.) (sales agent convicted of causing false information to be submitted to the FHA in connection with a sales report and a financial statement for mortgage insurance after he had his secretary falsify documents about the number of pre-sold units; "[T]he requirement that defendant willfully cause the forbidden act to be done, means that the act must not only have been the cause-in-fact of the defendant's activities, but also that defendant have the specific intent of 'bringing about' the forbidden act."), *cert. denied*, 400 U.S. 847 (1970).

272. 347 U.S. 1 (1954).

273. *Id.* at 8-9 (citing *Kenofsky*).

274. *Id.*

275. *Compare* *United States v. Kegler*, 724 F.2d 190, 195 (D.C. Cir. 1983) (stating that

The security in question was a check . . . drawn on a Virginia bank and deposited in the District of Columbia. Such depositing of a check causes the bank in the ordinary course of business to transmit the check interstate for payment. The person who deposits a forged check under such circumstances thereby knowingly causes it to be transported interstate and, given proof of the required criminal intent and knowledge, is liable as a principal under 18 U.S.C. § 2(b).),

with *United States v. Scandifia*, 390 F.2d 244, 249 (2d Cir. 1968), *vacated on other grounds*, 394 U.S. 310 (1969) (defendant was convicted of causing the transportation of fraudulent bonds from New York to New Jersey after he gave them to investors to use as collateral for short term loans:

We . . . hesitate to endorse the principle that a causal relationship could be found here merely because the interstate transportation was not in any way inconsistent with [defendant's] instructions and redounded to his benefit. In the absence of some evidence that [defendant] intended, knew, or could have reasonably foreseen that the innocent persons to whom he entrusted the bonds would take them across state lines, we question whether the jury would have been justified in concluding that he did more than provide others with the opportunity to do that which the law

An additional difficulty in defining the state of mind for "causing" arises from the role played by the interstate commerce element in federal offenses. It confers jurisdiction on a federal court, but it is not a material element of the offense, that is, it does not implicate the defendant's blameworthiness. If the conduct did not involve interstate commerce, it is still criminal, but it would be triable solely in a state court. In *United States v. Feola*,<sup>276</sup> the defendant was tried in a federal court for conspiring to assault a federal officer where an issue arose about what state of mind, if any, to imply in the statute on the federal status of the officer.<sup>277</sup> The Court decided that:

Given the level of intent[, that is, state of mind] needed to carry out the substantive offense, [it] fail[ed] to see how the agreement is any less blameworthy or constitutes less of a danger to society solely because the participants are unaware which body of law they intend[, that is, had knowledge of] to violate. Therefore, [it] conclude[d] that imposition of a requirement of knowledge of those facts that serve only to establish federal jurisdiction would render it more difficult to serve the policy behind the law of conspiracy without serving any other apparent social policy.<sup>278</sup>

Thus, because no state of mind was required in the substantive offense to satisfy the jurisdictional element, neither did conspiracy require a state of mind.<sup>279</sup>

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forbids. . . . In any event . . . we find that interstate transportation in this case was a reasonably foreseeable consequence of [defendant's] actions.)

*Id.* at 249.

276. 420 U.S. 671 (1975).

277. The Court observed:

With respect to the present case, . . . a mere general policy of deterring assaults would probably prove to be an undesirable or insufficient basis for federal jurisdiction; but where Congress seeks to protect the integrity of federal functions and the safety of federal officers, the interest is sufficient to warrant federal involvement. . . . The significance of labeling a statutory requirement as "jurisdictional" is not that the requirement is viewed as outside the scope of the evil Congress intended to forestall, but merely that the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute.

*Id.* at 677 n.9.

278. *Id.* at 694.

279. In *United States v. Scarborough*, 813 F.2d 1244 (D.C. Cir. 1987), the District of Columbia Circuit followed *Feola* and held that 18 U.S.C. § 2314 (proscribing interstate transportation of stolen goods) did not have a state of mind requirement for "causing" the interstate aspect of the transportation. The court observed:

Appellant argues that, in order to sustain a conviction under 18 U.S.C. § 2314, the government must prove that it was reasonably foreseeable that the cashier's check would travel in interstate commerce. Here the check was drawn on one bank in the District of Columbia and deposited in another, which he argues is inconsistent with foresight of any interstate travel. . . . [S]ince Congress intended interstate transportation to be "merely the linchpin for federal jurisdiction," and did not mean to relate interstate movement to the culpability of the underlying criminal acts, "the government should not have to prove that the interstate transport was in any way reasonably foreseeable.

*Id.* at 1245-46 (quoting *United States v. Ludwig*, 523 F.2d 705, 707 (8th Cir. 1975), *cert. denied*, 423 U.S. 1076 (1976)).

“Willfully” may also mean that the defendant knew that his act was illegal. Typically, however, federal courts hold that “a requirement that an act be done ‘willfully’ . . . does not necessitate proof that the defendant was specifically aware of the law penalizing his conduct.”<sup>280</sup> Nevertheless, in *United States v. Curran*,<sup>281</sup> the Third Circuit observed, “[A] proper charge for willfulness in cases brought under sections 2(b) and 1001 in the federal election law context requires the prosecution to prove that defendant knew of the treasurers’ reporting obligations, that he attempted to frustrate those obligations, and that he *knew his conduct was unlawful*.”<sup>282</sup> The jurisprudence of “willfulness” under § 2(b) remains unsettled.<sup>283</sup>

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280. *United States v. Hollis*, 971 F.2d 1441, 1451 (10th Cir. 1992), *cert. denied*, 507 U.S. 985 (1993). This holding follows the principle that “every person is presumed to know what the law forbids.” *Id.*

281. 20 F.3d 560 (3d Cir. 1994).

282. *Id.* at 569 (emphasis added). The *Curran* court relied on *Ratzlaf v. United States*, 114 S. Ct. 655 (1994), which involved causing a bank to fail to file currency transaction reports. *See infra* APPENDIX D (STATE OF MIND). The Third Circuit said: “The . . . obligations [in both cases involved] the defendant’s knowledge of a third party’s duty to disclose information to a government agency. . . . The underlying conduct [was] not obviously ‘evil’ or inherently ‘bad’ . . . [and t]he conduct at issue . . . was made illegal by a regulatory statute.” *Curran*, 20 F.3d at 569.

Initially, the National Commission on the Reform of Federal Criminal Laws planned to retain the present formulation of § 2, but it subsequently realized that “some changes for purposes of clarity and logic [were] necessary.” 1970 WORKING PAPERS, *supra* note 213, at 154. “Subsection b . . . d[id] not deal as clearly as it might with issues of scope of its application, requirements of culpability, and similar matters and ha[d] been justifiably criticized.” *Id.* In an attempt to clarify § 2(b), the Commission replaced the “vague” word “willfully” with “acting with the state of mind required for the commission of the offense.” *Id.* Earlier, the Model Penal Code adopted essentially the same language. *See* ALI, COMMENTARIES, *supra* note 148, § 2.06(2)(a) at 295 (“acting with the kind of culpability that is sufficient for the commission of the offense.”); LAFAVE & SCOTT, *supra* note 148, at 585 n.105 (“Only a few of the modern codes contain a [similar] provision.”). This type of language makes possible accomplice liability beyond the *Peoni* intent standard where the principal in the first degree is reckless or negligent in causing a particular result. *Id.* at 584-86.

283. *See Curran*, 20 F.3d at 566-67, 569 (due to district court’s failure to adequately explain state of mind under § 2(b), appellate court granted new trial in an appeal of conviction for causing election campaign treasurers to submit false reports to Federal Election Commission);

Section 2(b) makes it an offense to deliberately cause another person to perform an act that would violate federal criminal law . . . . Section 2(b) imposes criminal liability on those who possess the *mens rea* to commit an offense and cause others to violate a criminal statute. . . . [S]ection 2(b) merges the *mens rea* and *actus reus* elements and imposes liability on the person possessing the “evil intent” to cause the criminal statute to be violated.)

*United States v. Fairchild*, 990 F.2d 1139, 1141 (9th Cir.) (president of corporation convicted of causing false statements to be made to General Services Administration because he ordered his employees to ship plastic bags that did not conform to the contract and to sign certificates stating that the goods were conforming;

The defense and the government agreed that the jury should be instructed: “The defendant cannot be convicted unless the government proves to your satisfaction beyond a reasonable doubt that he acted willfully. One acts willfully if one does an act voluntarily and intentionally and with the purpose of causing a false . . . certificate to be filed with the government.” . . . [Defendant] acted voluntarily and intentionally and with the purpose of causing false . . . certificates to be filed because he continued to order packing by weight after he knew that false certificates were being signed and supplied to the GSA.),

*cert. denied*, 114 S. Ct. 266 (1993); *United States v. Walser*, 3 F.3d 380, 389 (11th Cir. 1993) (defendant convicted

### 3. Conduct

The conduct requirement under § 2(b) is straightforward. In *Kenofsky*, the Supreme Court stated, “ ‘cause’ is a word of very broad import and its meaning is

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of causing an insurance agent to commit perjury after the insurer company admitted documents into evidence that the defendant had falsified; “Section 2 . . . operates to unite [the agent’s] capacity to commit perjury with [defendant’s] intent that perjury be committed.”) (citations omitted); *United States v. Levy*, 969 F.2d 136, 141 (5th Cir.) (defendant convicted of causing an undercover agent to travel in interstate commerce in a money laundering scheme in which the federal agent would travel to different states for the defendant to retrieve cashier’s checks drawn on grocery store accounts that were exempt from filing currency transaction reports;

Under 18 U.S.C. § 2(b), there is no requirement of shared intent; only the person charged need have the *criminal intent*, the individual whom the defendant has caused to perform the act may be entirely innocent. . . . The fact that the government gave [the undercover agent] permission to follow through on [defendant’s] request does not affect the fact that [defendant’s] request caused [the undercover agent] to travel interstate for this illegal purpose. [Defendant] would have this court interpret the phrase “causes an act” to mean that the defendant must be the sole and proximate cause of the performance of the act. Such an interpretation would render 18 U.S.C. § 2(b) meaningless.),

*cert. denied*, 506 U.S. 1040 (1992); *United States v. Jordan*, 927 F.2d 53, 55 (2d Cir.) (defendant was convicted of causing an undercover agent to import heroin into the United States because he supplied the agent with it. “Defendant is . . . as liable for the importation as she would have been if she had physically carried the heroin from Thailand to New York. . . . She acted in a deliberate way to accomplish the act of importation.”), *cert. denied*, 501 U.S. 1210 (1991); *United States v. Moore*, 936 F.2d 1508, 1526 (7th Cir.) (defendant convicted of causing the possession of a firearm because he drove the getaway car in two armed robberies;

In both of the armed robberies in which Moore and Miles were involved, Moore was aware that Miles possessed a weapon and of its use in the armed robberies. Thus, the jury could have properly convicted Moore on a constructive possession theory as a principal to the firearms offense based upon the facts that he was an integral part of the armed robberies, and thus, as principal to both armed robberies, he was *aware* of Miles’ possession of a weapon and of its use in the armed robberies and could be held to have willfully participated in this possession under 18 U.S.C. § 2(b).),

*cert. denied*, 502 U.S. 991 (1991); *United States v. Richeson*, 825 F.2d 17, 19-20 (4th Cir. 1987) (defendant convicted for causing the concealment of material facts to the Treasury Department after he made multiple cash deposits from the proceeds of his money laundering scheme of less than \$10,000 at separate branches and to separate tellers to avoid the statutory reporting requirements;

[Defendant] does not contest the fact that he purposefully structured his currency transactions to avoid the filing requirements. . . . [B]y operation of § 2(b), [defendant’s] willful intent to cause concealment, combined with the financial institution’s duty to report and its innocent failure to report, constitute the elements of actionable concealment under § 1001.);

*United States v. Keefer*, 799 F.2d 1115, 1124-25 n.8 (6th Cir. 1986) (defendant convicted of causing false statements to be made on a mortgage application to the Federal Housing Authority after he filled out a mortgage form in his employee’s name for his own mortgage and had his employee sign the form without the employee first reading it;

Notice, however, that before any defendant may be held criminally responsible for acts of others, it is necessary that the accused willfully associate himself in some way with the criminal venture and willfully participate in it as he would in something he wishes to bring about; that is to say, he willfully seek by some act [or] omission of his to make the criminal venture succeed.);

*United States v. McKnight*, 799 F.2d 443, 446 (8th Cir. 1986) (defendant under indictment for obstruction of justice under 18 U.S.C. §§ 1503 and 2 on charges that she destroyed subpoenaed bank records, challenged the

generally known. It is used in the section in its well-known sense of *bringing about*.”<sup>284</sup> The decisions of the federal courts of appeals reflect similar language.<sup>285</sup>

#### 4. *Capacity*

The second addition to § 2(b) in 1951—the phrase “or another”—was intended to clarify that a person who is not a member of the class able to commit the crime could still be held liable for *causing* an innocent person to engage in the conduct otherwise constituting the offense. “Section 2(b) of title 18 [was] limited by the

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indictment because it did not state that she had to act “willfully”;

[E]very person who wilfully participates in the commission of a crime may be found guilty of that offense. Participation is wilful if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with *bad purpose* either to disobey or to disregard the law.);

United States v. Cyr, 712 F.2d 729, 732, 734 (1st Cir. 1983) (upholding defendant’s conviction for causing the misapplication of bank funds even though the court acquitted the loan officer who allowed her to receive the loans because she borrowed substantial amounts of money in her name and in the names of her employees for which she did not have collateral; The issue was

whether there was sufficient evidence to convict defendant of . . . causing him to misapply bank funds, 18 U.S.C. § 2(b) . . . . Defendant . . . was the one who obtained the proceeds of the loans . . . . [T]here was also some evidence that some of the monies obtained from the bank might have been used by the defendant personally . . . . [She also testified] that she was responsible for [the loan officer’s] downfall.);

United States v. Baker, 611 F.2d 961, 963 (4th Cir. 1979) (co-defendants, the owner and manager of a house of prostitution, were convicted, respectively, of causing and aiding and abetting the causing of the transportation of two women in interstate commerce for the purpose of prostitution; “[I]t was legally sufficient to establish that the interstate travel was *the result of a plan* made with [defendant] for the [women] to work at the truck stop.”); United States v. Alvillar, 575 F.2d 1316, 1320 (10th Cir. 1978) (defendant charged with causing illegal aliens to be transported by aircraft because he drove them to the airport and paid and arranged for their flight); The court distinguished between two cases:

causing a vessel to sail, or to be sent away, with intent to employ her in the slave-trade, and with intent that she should be employed in that trade. The former applies to an intent of the party causing the act, the latter to the employment of the vessel, whether by himself or a stranger . . . . [T]he employment by a mere stranger would not justify the conviction of the party charged with causing her to sail or to be sent away, with intent to employ her in the slave-trade, as owner . . . . Here, on the contrary, [defendant] directly arranged for the transportation of the aliens in the aircraft and earned a profit from it.).

284. *Kenofsky*, 243 U.S. at 443 (emphasis added).

285. See, e.g., *Jordan*, 927 F.2d at 55 (“‘Causation’ is not some attenuated relationship between offender and offense. The ‘causer’ is punishable as a principal for willful action that brings about an offense.”); *Kegler*, 724 F.2d at 200 (quoting *Kenofsky*, 243 U.S. at 443); *United States v. Levine*, 457 F.2d 1186, 1188 (10th Cir. 1972) (“In the context of [18 U.S.C. § 2(b)] ‘cause’ means ‘a principal acting through an agent or one who procures or brings about the commission of a crime.’ ”); *United States v. Inciso*, 292 F.2d 374, 378 (7th Cir.) (“The courts have uniformly construed the word ‘cause’ . . . to mean a principal acting through an agent or one who procures or brings about the commission of a crime.”), *cert. denied*, 368 U.S. 920 (1961); *United States v. Leggett*, 269 F.2d 35, 37 (7th Cir.) (“Cause means ‘to bring about; to bring into existence.’ It ‘is a word of very broad import’ and ‘is used in [18 U.S.C. § 2(b)] in its well-known sense of bringing about.’ ”), *cert. denied*, 361 U.S. 901 (1959).

phrase, 'which if directly performed by him would be an offense against the United States', to persons capable of committing the specific offense."<sup>286</sup> By adding the words "or another," Congress clarified that even if a person is not a member of the class who can violate a statute, he is still capable of causing another to commit the offense. Federal appellate courts uniformly apply this principle.<sup>287</sup>

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286. S. REP. NO. 82-020 at 7 (1951) (emphasis added).

287. See, e.g., *United States v. America Investors of Pittsburgh*, 879 F.2d 1087, 1095 (3d Cir.) (customer who met with corporation president and plotted methods to circumvent the corporation's duty to file currency transaction reports (CTRs) held properly convicted of causing the corporation's failure to report; "§ 2(b) is utilized to extend criminal liability to actors lacking legal capacity who cause intermediaries to commit criminal acts where the intermediary, though innocent of the substantive offense, has the capacity to commit that offense."), *cert. denied*, 493 U.S. 955 (1989); *Richeson*, 825 F.2d at 20 (defendant who made cash deposits to separate tellers at separate branches held properly convicted for willfully causing the bank to fail its duty to file CTRs; "However, by operation of § 2(b), Richeson's willful intent to cause a concealment, combined with the financial institution's duty to report and its innocent failure to report, constitute the elements of actionable concealment under § 1001."); *United States v. Tobon-Builes*, 706 F.2d 1092, 1101 (11th Cir. 1983) (defendants properly convicted of causing financial institutions to fail to report currency transactions after they went to 10 banks and each one purchased at each bank a cashier's check in the amount of \$9,000; "By adding the words 'or another' [to § 2(b)], Congress sought to extend criminal liability to defendants . . . who cause an intermediary to commit criminal acts where the intermediary, though innocent of the substantive offense, has the capacity to commit the offense and the causer lacks such capacity.") (citations omitted); *United States v. Ruffin*, 613 F.2d 408, 413-14 (2d Cir. 1979) (defendant convicted for causing the willful misapplication of federal funds by a federal officer, even though he was not a federal officer, and the trial court had acquitted the officer who committed the act;

We see no logical reason why a person who causes an innocent agent having the capacity to commit a criminal act to do so should not likewise be held criminally responsible under 18 U.S.C. § 2(b) even though the causer lacks the capacity. . . . Some argue that a person who causes someone with capacity to commit the crime . . . to do so could not be held criminally liable unless he personally had the capacity to commit the offense. Congress . . . removed any doubt about such a person's criminal responsibility by . . . [amending] 18 U.S.C. § 2(b) to add the words "or another.");

*United States v. Smith*, 584 F.2d 731, 734 (5th Cir. 1978) (son of licensed firearm dealer properly convicted of causing his father to fail to make the required entries in the firearms transactions records because he sold firearms at his father's licensed premises without making the appropriate entries;

A person who is incapable of committing a particular offense against the United States because he is not a member of a particular class, is nonetheless punishable as a principal, if he willfully causes an innocent person, capable of doing so, to commit the proscribed act or, as in this case, to fail to do a required act. Through his knowing and willful acts, to wit: selling his father's firearms on the licensed premises of his father, without making the records required by law, and without properly informing the licensee, [defendant] caused a licensee to fail to make and maintain the required records.);

*Levine*, 457 F.2d at 1188-89 (prison inmates properly convicted of causing others to travel in interstate commerce with the intent to carry on illegal activity involving narcotics even though because they were in prison they could not have traveled in interstate commerce;

Appellants are not charged as aiders and abettors . . . but with "causing the interstate travel" . . . "[C]ause" means "a principal acting through an agent or one who procures or brings about the commission of a crime. One so acting is chargeable as a principal and punishable accordingly. . . . The innocence of the agent does not diminish the principal's guilt.")

(citations omitted); *United States v. Lester*, 363 F.2d 68, 72-73 (6th Cir. 1966) (attorney for a house of prostitution,

### D. Civil Accomplice Liability

#### 1. Common Law

At common law, “[a]ll who actively participate in any manner in the commission of a tort, or who command, divest, advise, encourage aid or abet its commission are jointly and severally liable therefore.”<sup>288</sup> “For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he. . . knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself.”<sup>289</sup> The historical development may be summarized:

The original meaning of a “joint tort” was that of vicarious liability for concerted action. All persons who acted in concert to commit a trespass, in pursuance of a common design, were held liable for the entire result. In such a case there was a common purpose, with mutual aid in carrying it out; in short, there was a joint enterprise, so that “all coming to do an unlawful act, and of one party, the act of one is the act of all of the same party being present.” Each was therefore liable for the entire damage done, although one might have battered, while another imprisoned the plaintiff, and a third stole the plaintiff’s silver buttons. All might be joined as defendants in the same action at law, and since each was liable for all, the jury would not be permitted to apportion the damages. The rule goes back to the early days when the action of trespass was primarily a criminal action. . . . This principle, somewhat extended beyond its original scope, is still law. All those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt the wrongdoer’s acts done for their benefit, are equally

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who set up a sheriff with a prostitute and then called the police to arrest him, held properly convicted of conspiring and aiding and abetting police officers in depriving the sheriff of his fourth amendment rights;

[I]t was held long ago that even though “a defendant was incompetent to commit the offense as principal by reason of not being of a particular age, sex, condition, or class, he may, nevertheless, be punished as procurer or abettor.” . . . It has been beyond controversy, then, at least since the 1951 amendment to 18 U.S.C. § 2(b), that the accused may be convicted as causer, even though not legally capable of personally committing the act forbidden by a Federal statute, and even though the agent willfully caused to do the act is himself guiltless of any crime.)

(citations omitted), *cert. denied*, 385 U.S. 1002 (1967); *Inciso*, 292 F.2d at 378 (head of a local labor union held properly convicted of causing a representative of employees to receive funds from employers;

[D]efendant by causing the crime to be committed by the union caused a crime to be committed by another as set forth in 18 U.S.C. § 2(b) . . . and is punishable as a principal. Defendant is not charged as an aider and abettor under . . . § 2(a). . . . [D]efendant is clearly charged with causing the commission of an offense which would be and is a crime if directly performed by another.).

288. THOMAS M. COOLEY, 1 A TREATISE ON THE LAW OF TORTS, 244 (3d ed. 1906).

289. RESTATEMENT (SECOND) OF TORTS § 876(b) (1977) [hereinafter RESTATEMENT] “If the encouragement or assistance is a substantial factor in causing the resulting tort, the one giving it is himself a tortfeasor and is responsible for the consequences of the other’s act.” RESTATEMENT, § 876(b), cmt. d.



liable.<sup>290</sup>

The modern shape of civil accomplice liability was thoroughly explored by Judge Patricia Wald in *Halberstam v. Welch*.<sup>291</sup> Halberstam, a noted doctor, was murdered by Welch, an infamous burglar. In a subsequent civil wrongful death and survivor action, Judge Wald found Welch's paramour, who worked with the murderer, liable as a joint venturer in the burglary-murder under the theories of both civil conspiracy and accomplice liability. In finding her liable, Judge Wald held that civil accomplice liability includes three elements:

- (1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation.<sup>292</sup>

The *Halberstam* court also recognized another factor—"the duration of the assistance provided."<sup>293</sup>

## 2. Statutory Law

Generally, federal civil jurisprudence rests on a statutory basis.<sup>294</sup> Without a statutory basis for civil accomplice liability, it does not exist. In *Central Bank, N.A. v. First Interstate Bank, N.A.*,<sup>295</sup> the Supreme Court answered a question it had reserved in two prior decisions<sup>296</sup> and held that the defendant bank could not be

290. WILLIAM PROSSER & PAIGE KEETON, TORTS 322-23 (5th ed. 1984).

291. 705 F.2d 472 (D.C. Cir. 1983).

292. *Id.* at 477 (citations omitted). The RESTATEMENT also lists factors to guide courts in defining "substantial assistance:"

The assistance of or participation by the defendant may be so slight that he is not liable for the act of the other. In determining this, [1] the nature of the act encouraged, [2] the amount of assistance given by the defendant, [3] his presence or absence at the time of the tort, [4] his relation to the other and [5] his state of mind are all considered.

RESTATEMENT, *supra* note 289, § 876(b), cmt. d.

293. 705 F.2d at 484. Nevertheless, after holding the defendant liable for the wrongful death, the court noted, at the end of its opinion:

Tort law [of civil conspiracy and accomplice liability] is not, at this juncture, sufficiently well developed or refined to provide immediate answers to all the serious questions of legal responsibility and corrective justice. . . . Precedent, except in the securities area, is largely confined to isolated acts of adolescents in rural society. Yet the implications of tort law in this area as a supplement to the criminal justice process and possibly as a deterrent to criminal activity cannot be casually dismissed.

*Id.* at 489.

294. Compare *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938) ("There is no federal general common law."), with *Halberstam*, 705 F.2d at 489 (law of District of Columbia under U.S. Const. Art I, § 8).

295. 114 S. Ct. 1439 (1994).

296. See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 379 n.5 (1983) ("The trial court also found that Herman & MacLean had aided and abetted violations of § 10(b). While several Courts of Appeals have permitted

held liable as an aider and abettor to a violation of § 10(b) of the Securities Exchange Act of 1934. The Court concluded that “the text of the 1934 Act . . . [did] not itself reach those who aid and abet a § 10(b) violation.”<sup>297</sup> That conclusion, it held, “resolve[d] . . . the case.”<sup>298</sup> Nevertheless, as the dissent noted, by its holding in *Central Bank*, the Court overturned “hundreds of judicial and administrative proceedings in every circuit in the federal system”:<sup>299</sup> “[A]ll 11 Courts of Appeals to have considered the question have recognized a private cause of action against aiders and abettors under § 10(b) and Rule 10b-5.”<sup>300</sup>

In *Central Bank*, the Court commented that “Congress . . . [knows] how to impose aiding and abetting liability when it [chooses] to do so.”<sup>301</sup>

Thus, when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant’s violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors. . . . Congress instead has taken a statute-by-statute approach to civil aiding and abetting liability.<sup>302</sup>

The Court then reviewed various statutes that provide for civil accomplice liability. For example, the Internal Revenue Code imposes penalties for aiding and abetting the understatement of tax liability.<sup>303</sup> Similarly, the Commodity Exchange Act

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aiders-and-abettor liability, we specifically reserved this issue.”) (citations omitted); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 191-2 n.7 (1976) (“In view of our holding that an intent to deceive, manipulate, or defraud is required for civil liability under § 10(b) and Rule 10b-5, we need not consider whether civil liability for aiding and abetting is appropriate under the section and the Rule, nor the elements necessary to establish such a cause of action.”).

297. *Central Bank*, 114 S. Ct. at 1448.

298. *Id.*

299. *Id.* at 1456.

300. *Id.* (Stevens, J., dissenting); see also *id.* at 1456 n.1 (citing cases).

301. *Id.*

302. *Id.* at 1450-51.

303. The Internal Revenue Code, in pertinent part, provides:

Any person—

(1) who aids or assists in, procures, or advises with respect to, the preparation of any portion of a return, affidavit, claim or other document,

(2) who knows (or has reason to believe) that such portion will be used in connection with any material matter arising under the internal revenue laws, and

(3) who knows that such portion (if so used) would result in an understatement of the liability for tax of another person,

shall pay a penalty.

26 U.S.C. § 6701(a) (1994). A 1989 amendment to the statute added the words “or has reason to believe.” The state of mind was thus lowered from “knowledge” to “recklessness.” See *Nielsen v. United States*, 976 F.2d 951, 954-55 (5th Cir. 1992) (a general partner, certified public accountant and lawyer for a research entity that violated the Tax Reform Act of 1984, by taking illegal tax credits for research that was already completed, found to be an accomplice to the promotion of these abusive tax shelters); *id.* at 953 n.6 (“Section 6701 imposes liability upon those who aid, assist or advise the preparer of a tax document with knowledge that an understatement of tax will result.”); *id.* at 955 ([It] imposes aiding and abetting liability on ‘any person’ and is not bound by the term of art—‘tax return preparer’. . . . Surely, [petitioner] aided and abetted the investors who joined his partnerships in

provides certain circumstances in which a private right of action exists.<sup>304</sup> Indeed, as the Supreme Court acknowledged, “various provisions of the securities laws prohibit aiding and abetting, although violations are enforceable only in actions brought by the SEC.”<sup>305</sup>

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their quest to diminish their tax liability. [He] actively promoted, marketed and sold. . . interests to investors.”). *Mullikin v. United States*, 952 F.2d 920, 922 (6th Cir. 1991) (accountant who prepared employment tax returns and wage and tax statements in which he failed to include portions of wages paid in cash found liable as an accomplice in the understatement of the tax liabilities; “[He] omitted cash compensation paid to . . . employees; this omission resulted in the understatement of . . . [employer’s] tax liability and the employees’ income tax liability. The Internal Revenue Service determined that [his] actions constituted aiding and abetting of the understatement of tax liability within the meaning of 26 U.S.C. § 6701.”), *cert. denied*, 506 U.S. 827 (1992).

304. The Commodity Exchange Act, in pertinent part, provides:

Any person . . . who willfully aids, abets, counsels, induces, or procures the commission of a violation of this chapter shall be liable for actual damages resulting from one or more of the transactions referred to in subparagraphs (A) through (D) of this paragraph and caused by such a violation to any other person—(A) who received trading advice from such person for a fee; (B) who made through such person any contract of sale of any commodity for future delivery . . . ; or who deposited with or paid to such person money, securities, or property . . . ; (C) who purchased from or sold to such person or placed through such person an order for the purchase or sale of—(i) an option . . . , (ii) a contract . . . , (iii) an interest or participation in a commodity pool; or (D) who purchased or sold a contract referred to in subparagraph (B) hereof.

7 U.S.C. § 25(a)(1) (1994); *see also Ikuno*, 912 F.2d at 312 (attorney who was responsible for the incorporation and signed the annual reports for a phantom corporation could be liable to investors if his conduct continued after § 25(a) became effective; “7 U.S.C. § 25(a) provides for a private right of action for aiding and abetting violations. . . . If [appellant] were able to prove that [the attorney] was aware that [the company] was selling commodities unlawfully, a trier of fact could conclude that [the attorney] aided, abetted, or counseled the other defendants in committing a crime against [appellant].”) In *Ikuno*, the Ninth Circuit read “willfully” in § 25(a) (1) to mean “with knowledge.” *See id.*

305. *Central Bank*, 114 S. Ct. at 1451. For example, 15 U.S.C. § 780(b)(4)(E) (1994), in pertinent part, provides:

The commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any broker or dealer if it finds, . . . that [it] is in the public interest and that such broker or dealer, . . . , or any person associated with such broker or dealer, . . . , has willfully aided, abetted, counseled, commanded induced, or procured the violation by any other person of [various securities laws].”

These statutory provisions also receive a straightforward interpretation; responsibility under the “willfully” standard extends to negligent conduct. *See, e.g., Gross v. SEC*, 418 F.2d 103, 107 (2d Cir. 1969) (vice-president of broker-dealer firm held liable as an accomplice to fraudulent representations that the firm’s salesmen made in regards to stock in a company the firm was selling;

[Defendant], among other things, “actively participated in managing its (registrant’s) affairs” and . . . he “attended sales meetings, shared in the profits from registrant’s retail sales, and knew or should have known of the improper activities” . . . [Therefore], the Commission could have concluded that he “aided and abetted” activities of the firm which were found to be in violation of the federal securities law anti-fraud provisions.);

*Nees v. SEC*, 414 F.2d 211, 220-21 (9th Cir. 1969) (salesman for a securities company found liable as an accomplice to the sale of unregistered securities even though he never actually sold them because he was active in their acquisition;

The Commission found that petitioner “was active in obtaining the . . . shares for registrant and must have known that registrant, which was making a market in . . . stock was acquiring the shares

### E. RICO Criminal and Civil Accomplice Liability

During the pre-*Reves* period, the application of § 2 in a criminal RICO prosecutions produced only a handful of circuit court decisions that expressly applied or mentioned the provision.<sup>306</sup> They were largely unremarkable.<sup>307</sup> The

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with a view to distribution" . . . . It is well established that in certain circumstances the term "willful" has no connotation of evil intent; it means only that the act was a conscious, intentional action. . . . Clearly, petitioner's acts fall within this definition of "willful" . . . . We also find . . . that petitioner should have known that the . . . securities should have been registered; their sale violated § 5 of the Securities Act, and petitioner can be held responsible for his part in the perpetration of this offense.).

306. See generally UNITED STATES DEP'T OF JUSTICE, RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO): A MANUAL FOR FEDERAL PROSECUTORS 73 (3d ed. 1990). Nevertheless, the courts tended to view the issue as one of aiding and abetting the "racketeering activity" rather than aiding and abetting "RICO." The point is minor; if a person aids and abets charged predicate offenses *with an appropriate RICO state of mind*, he aids and abets the RICO offense itself. The issue of aiding and abetting the RICO offense itself, that is, those elements of the statute other than the "racketeering activity", as a means of either aiding and abetting the RICO offense itself or the "pattern of racketeering activity" does not generally appear in the decisions. *But see* United States v. Wyatt, 807 F.2d 1480, 1483 (9th Cir.), *cert. denied*, 484 U.S. 858 (1987) Wyatt, however, is criticized for permitting a conviction under 18 U.S.C. § 1962(a) to stand under an aiding and abetting theory under 18 U.S.C. § 2(a), because the defendant aided and abetted the "investment," not the "pattern of racketeering activity." See II ARTHUR F. MATHEWS, *et. al.*, CIVIL RICO LITIGATION § 10.03, at 10-18, n.35 (2d ed. 1993). That criticism is misplaced because, as the Court correctly held, if a person engages in "racketeering activity" and he "receives" income from it and "uses" it in the "operation of an enterprise," he violates § 1962(a). To be a principal in the second degree, another person need only aid and abet some aspect of that conduct with an appropriate state of mind; that person need not engage in the same acts that constitute the substantive offense by the principal in the first degree or even be a member of the same class as the principal in the first degree. *Wyatt*, 807 F.2d at 1484 (citing United States v. Loftin, 518 F. Supp. 839, 851-52 (S.D.N.Y. 1981), *aff'd* 819 F.2d 1130 (2d Cir. 1987)). Accordingly, *Wyatt* correctly held that Sorolov, an attorney who did not engage in the heroin racketeering activity, could aid and abet under § 2 and conspire under § 1962(d) with the trafficker in the investment of the proceeds of the trafficking in violation of § 1962(a). *Id.* at 1485 (citing *Standever v. United States*, 447 U.S. 10, 18 n.11 (1980) (a defendant need not be in class defined as a principal in first degree in order to aid and abet) and *United States v. Rabinowich*, 238 U.S. 78, 81 (1915) (a defendant need not be in class defined as a principal in first degree in order to conspire)). The express reference to § 2 in the text of § 1962(a) is, however, sometimes read negatively to preclude its application to §§ 1962(b) and (c). Judith L. Rosenthal, Comment, *Aiding and Abetting Liability for Civil Violation of RICO*, 61 TEMP. L. REV. 1481, 1505 (1988). This view, too, is mistaken:

Sections 1962(b) and (c) contain no similar reference to aiding and abetting liability, but this should not be taken as an indication that aiding and abetting principles were intended to apply to section 1962(a) alone. Because section 1962(a) is the only violation for which the predicate act is temporally separated from its impact on the enterprise (*i.e.*, the proscribed impact on the enterprise is not "through" the predicate act), it is essential that section 1962(a) contain language specifying the required level of participation of the investing person in the earlier predicate acts. The reference to 18 U.S.C. § 2 in section 1962(a) is needed to limit the scope of that section to persons with criminal responsibility for the predicate acts. Otherwise, persons receiving income derived from predicate acts in which they played no role could be exposed to section 1962(a) liability, which would broaden the potential scope of liability enormously.

MATHEWS, *supra*, § 10.03, at 10-17. This view is not only correct as a matter of statutory analysis, but is supported by explicit legislative history. See S. REP. NO. 91-617 at 159 (1969) (text of letter of Deputy Attorney General Richard G. Kleindienst dated September 11, 1969 recommending the addition of § 2 language to narrow the scope of § 1962(a)). Kleindienst's view was adopted by the Committee.

307. See, *e.g.*, United States v. Masters, 924 F.2d 1362 (7th Cir.) (defendant's RICO conviction upheld based upon his being an accomplice to a murder after he paid another man to kill a woman), *cert. denied*, 500 U.S. 919

general jurisprudence on capacity was also followed, and the decisions uniformly recognized that the defendant need not be a member of the class capable of violating the statute to be held liable as an aider or abettor.<sup>308</sup>

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(1991); *United States v. Vastola*, 899 F.2d 211, 224 (3d Cir.) (RICO conviction upheld where jury instruction for extortion, mail, wire, bankruptcy and insurance fraud read: "The government must prove beyond a reasonable doubt that each defendant committed, or knowingly and willfully aided and abetted in commission of, at least two of the racketeering acts with which he is charged."), *vacated on other grounds*, 497 U.S. 1001 (1990); *United States v. Pryba*, 900 F.2d 748, 759 (4th Cir.) (RICO conviction for obscenity upheld; "The government must prove: [that] each defendant agreed to personally commit or aid and abet two or more acts of racketeering in violation of Section 1962(a)."), *cert. denied*, 498 U.S. 924 (1990); *United States v. Daly*, 842 F.2d 1380, 1390 (2d Cir.) (RICO conviction upheld based upon defendant's being an accomplice to the receipt of money on behalf of an employee of a labor union from an employer whose employees were represented by that union in violation of the Taft-Hartley Act; "In all, the evidence was ample to permit the jury to infer beyond a reasonable doubt that [the defendant] had associated himself from the outset with the arrangements whereby [the principal], [the defendant], and others in the Gambino crime family would share the \$100,000 . . . in exchange for eliminating . . . problems with [the union]"), *cert. denied*, 488 U.S. 821 (1988); *Qaoud*, 777 F.2d at 1118 (RICO conviction upheld based on defendant's being an accomplice to the bribery of a state judge;

The abolition of a distinction between an accessory and a principal [is] set out in [the Michigan Code]. . . . The purpose of this section, a part of the procedural law, was not only to abolish the common law distinction, but also to enable an aider or abettor of a substantive criminal offense (such as bribery) to be tried and convicted as if he had directly committed the criminal offense.);

*Cauble*, 706 F.2d at 1339-40 (defendant-leader of the so-called "Texas Cowboy Mafia" held properly convicted of a substantive RICO violation for aiding and abetting marijuana smuggling and violations of the Travel Act;

[Defendant] contends that the proof of RICO predicate offenses was insufficient because the government failed to prove beyond a reasonable doubt that he aided and abetted either the smuggling episode or the acts of travel . . . . To prove a person guilty of aiding and abetting, the government must show that the defendant associated himself with an unlawful venture, participated in it with the desire of accomplishing the illegal end, and sought by his actions to make it succeed. The defendant must intend to commit the offense and participate in some manner to aid its commission, but need only aid and abet, rather than commit, each element of the crime. . . . A reasonable jury might have concluded on the record of the evidence that [the defendant] knew of the drug-smuggling activities and knew the purpose of the acts of travel. Having reached the decision to reject [defendant's] lack-of knowledge defense, it might have concluded that [he] associated with, participating in, and seeking the success of a series of smuggling incidents.);

*United States v. Greenleaf*, 692 F.2d 182, 189 (1st Cir. 1982) (RICO conviction upheld based upon defendant's being an accomplice to acts of mail fraud committed by a union in forging time cards of non-existent employees), *cert. denied*, 460 U.S. 1069 (1983); *Tillem*, 906 F.2d at 822 (RICO conviction based on extortion reversed where defendant took money from restaurant owners and paid off health inspectors so that the restaurants would pass inspection;

[A]t most [the defendant could] be found guilty of bribery . . . . While bribery and extortion are not neatly separable, they are distinct crimes. Both payor and the recipient of a bribe are guilty of a crime, while under extortion statutes only the extortionist has broken the law. Without evidence that the payor feared some negative intervention for nonpayment, the payment is solely intended to secure an otherwise unsecured result. [A] victim [must go] beyond passive compliance and . . . [become] an active participant in [the] conspiracy. [But where the evidence] merely establishe[d] that [the defendant] operated as a conduit through which the department defendants extorted money from restaurateurs. . . . It does not prove that [the defendant] was an aider and abettor of the extortion conspiracy because . . . a reasonable jury could not find that [the defendant] himself promoted the conspiracy and had a stake in the outcome.)

(citing *Nye & Nissen*, 336 U.S. at 619).

308. See, e.g., *United States v. Norton*, 867 F.2d 1354, 1558-59 (11th Cir.) (pre-*Reves* conviction upheld based

Unfortunately, the federal courts of appeals split on what state of mind, if any, was to be implied in the statute on elements of RICO other than "racketeering activity", that is, "enterprise," "pattern," "commerce," etc. The Second Circuit took the lead, holding that no state of mind was required,<sup>309</sup> the Third,<sup>310</sup>

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on conspiracy to violate RICO where the predicate act was 18 U.S.C. § 1954, even though defendant was not a pension plan officer), *cert. denied*, 491 U.S. 907 (1989); *United States v. Rastelli*, 870 F.2d 822, 831-32 (2d Cir.) (RICO conviction upheld where defendant, who was not an employer nor a union representative, was convicted as an accessory to an employer's demand for money in exchange for labor peace in violation of the Taft-Hartley Act; "Because [defendant], a capo in the Bonanno family, was neither an employer nor a union representative, he could not be found primarily liable under § 186, but could be and was convicted on these counts as an aider and abettor"), *cert. denied*, 493 U.S. 982 (1989); *United States v. Margiotta*, 688 F.2d 108, 131-32 (2d Cir. 1982) (RICO conviction upheld where defendant was charged under the Hobbs Act even though he was not a public official committing extortion under color of official right;

[T]he requirements of 18 U.S.C. § 2(b) were met. The section is based on the precept that an individual with the requisite criminal intent may be held liable as a principal if he is a cause in fact in the commission of a crime not withstanding that the proscribed conduct is achieved through the actions of innocent intermediaries. [T]he defendant who caused them to act in this way is viewed as having 'adopt[ed] not only [their] act but [their] capacity as well.'),

*cert. denied*, 461 U.S. 913 (1983).

309. See *United States v. Boylan*, 620 F.2d 359, 361-62 (2d Cir.) (defendant's RICO conviction based upon Taft-Hartley Act violations upheld despite objection to jury instructions which required a state of mind more favorable to the defendant than necessary, because the Taft-Hartley Act does not impose a state of mind requirement and "the RICO count does not include a scienter element over and above that required by the predicate crimes."), *cert. denied*, 449 U.S. 833 (1980); *United States v. Scotto*, 641 F.2d at 55-56 (RICO conviction based upon Hartley Act violations upheld over challenge to jury on state of mind element; "[A]lthough the concedes that willfully committing some unlawful predicate act necessary, no specific intent to engage in an unlawful pattern racketeering prohibited by RICO is required. Here . . . we the court's charge was favorable to the defendant because permitted conviction under RICO only if the jury found 'criminal motive or purpose.' "); *United States v. Biasucci*, 786 F.2d 504, 512 (2d Cir. 1986) (defendant's RICO conviction for being an accomplice to the collection of an unlawful debt upheld over challenge to jury instructions because they did not require the government to prove that the defendants knew the rates of interest charged on the loans;

We do not agree that RICO requires proof of such specific knowledge. . . . We previously have observed that RICO imposes no additional mens rea requirement beyond that found in the predicate crimes. . . . Consequently, we look to the scienter elements found in the statutory definitions of the predicate crimes to determine the degree of knowledge that must be proved to establish a RICO violation.),

*cert. denied*, 479 U.S. 827 (1986); *Scotto*, 641 F.2d at 55-56 (RICO conviction based upon Taft-Hartley Act violations upheld over challenge to jury instruction on state of mind element;

[A]lthough the government concedes that willfully committing some unlawful predicate act is necessary, no specific intent to engage in an unlawful pattern of racketeering prohibited by RICO is required. Here . . . we think the court's charge was favorable to the defendant because it permitted conviction under RICO only if the jury found a 'criminal motive or purpose.').

310. See *Gentry v. Resolution Trust Corp.*, 937 F.2d 899, 908-14 (3d Cir. 1991) (municipal corporation cannot be held liable for treble damages under RICO;

The RICO statute itself is silent on the issue of mens rea and its legislative history offers no illumination . . . In the absence of any judicial authority to the contrary, we assume for purpose of this discussion that civil RICO requires no special mens rea beyond that associated with the commission of a pattern of the individual predicate offenses.")

(citing *Biasucci*, 786 F.2d at 512).

Ninth<sup>311</sup> and Eleventh Circuits<sup>312</sup> then cited the Second Circuit's view with favor. The Eighth Circuit, on the other hand, commented unfavorably on the Second Circuit's view.<sup>313</sup> Other circuits neither followed the Second Circuit's lead nor cited nor distinguished its decisions or those that followed them.<sup>314</sup> Because the

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311. See *United States v. Blinder*, 10 F.3d 1468, 1477 (9th Cir. 1993) (defendant's RICO conviction for conspiracy and securities fraud upheld despite challenge to jury instructions as omitting the "mental element of substantive RICO": "[T]he RICO statute does not discuss *mens rea* . . . . Moreover, the Second Circuit has held that 'RICO imposes no additional *mens rea* requirement beyond that found in the predicate crimes.' ").

312. See *United States v. Pepe*, 747 F.2d 632, 675 (11th Cir. 1984) (jury instructions for RICO charge for drug violations upheld despite challenge to conspiracy and substantive violation because they did not inform the jurors that defendant's participation in the enterprise's affairs had to be with knowledge; "In *Diecidue*, we rejected this contention. A plain reading of the RICO statute indicates that RICO does not contain any separate *mens rea* or scienter elements beyond those encompassed in its predicate acts.") (citation omitted). *Pepe* misread the decision in *United States v. Diecidue*, 603 F.2d 535 (5th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980). The Fifth Circuit did not hold that a state of mind was not necessary for the RICO elements; in fact, the court reversed the defendant's conviction because "[w]ithout evidence that [the defendant] knew something about his codefendant's related activities which made the enterprise, he could not be convicted of conspiring to engage in a pattern of racketeering as defined by the statute." *Id.* at 556.

313. In *United States v. Bledsoe*, 674 F.2d 647, 661 (8th Cir. 1982), *cert. denied*, 459 U.S. 1040 (1982), the Court observed that:

Courts have also held that participation in the conduct of an enterprise's affairs through a pattern of racketeering activity does not involve any degree of scienter greater than necessary to commit the crimes constituting the pattern of racketeering. We express grave doubts as to the propriety of the holdings in these cases.

314. See, e.g., *United States v. Crockett*, 979 F.2d 1204, 1218 (7th Cir. 1992) (defendant convicted of substantive and conspiracy RICO violations arising out of an extortion scheme to collect a street tax from various illegal businesses; "The evidence was sufficient for a reasonable jury to find that [the defendant] was aware of the essential nature and scope of the enterprise and intended to participate in it."), *cert. denied*, 113 S. Ct. 1617; *United States v. Perholtz*, 842 F.2d 343, 354 (D.C. Cir.) (RICO conviction upheld where a scheme to profit from government contracts was obtained through fraudulent means;

To sustain a RICO conviction, . . . the government must prove beyond a reasonable doubt that an enterprise existed as charged in the indictment; that the enterprise affected interstate commerce; that the defendant was associated with the enterprise; and that the defendant knowingly participated, even indirectly, in the conduct of the enterprise through a pattern of racketeering.),

*cert. denied*, 448 U.S. 821 (1988); *United States v. Eufrazio*, 935 F.2d 553, 577 n.29 (3d Cir.) (defendant's RICO conviction upheld;

The 'association' requirement of 18 U.S.C. § 1962(c) requires that any defendant prosecuted thereunder 'must be shown to have been aware of at least the general existence of the enterprise named in the indictment' . . . . The same is true if a defendant is charged under § 1962(d) with a conspiracy to violate § 1962(c).),

*cert. denied*, 502 U.S. 925 (1991); *United States v. Schell*, 775 F.2d 559, 569 (4th Cir. 1985) (defendant's RICO conspiracy and substantive conviction for supplying drugs upheld despite claim of insufficient evidence to establish his membership in enterprise;

The mere fact that Schell did not know every other member of the enterprise or have actual knowledge of their activities is irrelevant. To sustain his RICO conviction, it is sufficient that he knew the existence of the enterprise and that the scope of the enterprise extended beyond his individual role as supplier.),

*cert. denied*, 475 U.S. 1098 (1986); *United States v. Martino*, 648 F.2d 367, 394 (5th Cir. 1981) (various defendants convicted of substantive and conspiracy RICO violations in a scheme involving numerous arsons to

Second Circuit's teaching on state of mind under RICO cannot be squared with the fundamental teachings of Supreme Court jurisprudence, it is not the law.<sup>315</sup>

During the pre-*Reves* period, the application of accomplice liability under civil RICO in litigation brought by the government or private plaintiffs produced great conceptual confusion. The first two circuit court decisions were unremarkable. No doubt was expressed that accomplice liability was applicable or that the standard of civil liability was the criminal standard under 18 U.S.C. § 2. The issue was first extensively litigated in *United States v. Local 560 (I.B.T.)*,<sup>316</sup> where the government brought a civil RICO action against twelve individuals, union Local 560, and Local 560's Welfare Fund. The government's complaint alleged that an organized criminal group acquired an interest in and control over Local 560 and the Welfare Fund through a pattern of murder and extortion in violation of § 1962(b), (c), and (d). Seven of the eleven individuals on the Executive Board of Local 560 were charged with aiding and abetting the organized crime group. In an able and wide-ranging opinion, Judge Harold Ackerman found that the burden of proof in government civil suits was by a preponderance of the evidence;<sup>317</sup> that a state of mind, beyond a "pattern of racketeering activity," was required for the RICO elements;<sup>318</sup> and that "as to aiding and abetting, the conduct requirement under 18 U.S.C. § 2 is complicity with or facilitation of the criminal conduct of another."<sup>319</sup>

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defraud insurance companies; "A defendant must know something about his co-defendants' related activities which make up the enterprise, but it is not necessary that he be aware of all racketeering activities of each of his partners in the enterprise."), *cert. denied*, 456 U.S. 943 (1982); *Elliott*, 571 F.2d at 906-07 (defendant's RICO conviction reversed because the evidence was insufficient to show knowledge of elements beyond his participation).

315. The Supreme Court's traditional state of mind jurisprudence is hardly a model of clarity or consistency; it lacks that minimum coherence that comes with self-awareness or attention to detail. Nevertheless, the Court made a major effort in its October 1994 term to give new shape to its teachings on state of mind in criminal law jurisprudence. An understanding of that jurisprudence requires an examination of first principles. *See generally* APPENDIX D (STATE OF MIND).

316. 581 F. Supp. 279, 331, 332 & n.30 (D.N.J. 1984), *aff'd*, 780 F.2d 267, 284 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986).

317. *Id.* at 326-28 ("The relief sought by the government in this action—that which is authorized by § 1964(a)—is equitable and remedial in nature, not punitive.") (citing *United States v. Cappelto*, 502 F.2d 1351, 1358 7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975)). § 1964(a) is crucial to the efforts of the Department of Justice to reform through civil litigation union dominated by organized crime; it is not the focus of these materials, but it merits extended treatment. *See generally* APPENDIX E (§ 1964(A)).

318. *Local 560*, 581 F. Supp. at 332 (distinguishing *Scotto*, 641 F.2d at 55-56, and related decision, and following *United States v. Sutherland*, 656 F.2d 1181, 1191-95 (5th Cir. 1981), *cert. denied*, 455 U.S. 949 (1982), and related decisions).

319. *Local 560*, 581 F. Supp. at 332 ("while this is a civil RICO action, the substantive theory which is applicable is none the less criminal both as to aiding and abetting and as to conspiracy.") A prior district court decision inconclusively faced the same issue. In *Moss v. Morgan Stanley, Inc.*, 553 F. Supp. 1347, 1361-63 (S.D.N.Y.), *aff'd on other grounds*, 719 F.2d 5 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984), applying the criminal accomplice standards, Judge Pollock imposed on civil RICO claims an organized crime limitation, a racketeering activity injury limitation, and a criminal standard for aiding and abetting. He relied on *United States v. Clemente*, 640 F.2d 1069, 1079 (2d Cir.) ("To aid and abet the commission of a crime, a defendant must 'in some sort associate himself with the venture, . . . participate in it as something he wished to bring about [and] seek by his action to make it succeed.'") (quoting *Peoni*, 100 F.2d at 402), *cert. denied*, 454 U.S. 820 (1981).



Judge Ackerman stated the appropriate standard—“(1) That the substantive crime has been committed, and (2) that the defendant . . . knew of the commission of the substantive offense and acted with intent to facilitate it”<sup>320</sup>—and then applied it:

Here, where the Local's officials were under an affirmative duty to act on behalf of the membership, a defendant's deliberate refusal either to act or to investigate (i.e. the conscious avoidance of knowledge)—while knowing the consequences of such inaction—can satisfy this element, so long as that defendant had some interest in the successful accomplishment of the crime being committed.<sup>321</sup>

The Third Circuit affirmed the district court's decision.<sup>322</sup> The defendants argued on appeal that their conduct “may have violated certain fiduciary standards,” but it “did not constitute criminal aiding and abetting.”<sup>323</sup> The Third Circuit disagreed, holding that “the district court did, in fact, rely on the appropriate test for establishing liability under the aiding and abetting statute, 18 U.S.C. § 2 . . . [and that] although the . . . case . . . [was] civil in character, the criminal standard for aiding and abetting appli[ed].”<sup>324</sup>

Without showing any awareness of the Third Circuit's decision in *Local 560*, the Fifth Circuit subsequently decided *Armco Indus. Credit Corp. v. SLT Warehouse Co.*<sup>325</sup> Armco, a commercial lender, agreed with an oil field supplier to advance

Nonetheless, the persuasive force of Judge Pollock's opinion was substantially undermined because he cited no statutory basis for his criminal aiding and abetting holding, and he found that “even if a standard of civil derivative liability were adopted, which it is not, then Morgan Stanley still could not be derivatively civilly liable” either. *Moss*, 553 F. Supp. at 1362. The persuasive force of Judge Pollock's decision was also undermined by his general hostility to private civil suits under RICO and the errors he made on other issues. *See, e.g., Sedima*, 473 U.S. at 495 (no organized crime or racketeering act limitation.)

320. *Local 560*, 581 F. Supp at 332 (citations omitted).

321. *Id.* (citing *Moss*, 553 F. Supp. 1347). Less than two weeks later, Judge Werker decided *Laterza v. American Broadcasting Co. Inc.*, 581 F. Supp. 408 (S.D.N.Y. 1984). In contrast to Judge Pollock, Judge Werker required the civil RICO complaint to “demonstrate that the defendant consciously assisted the commission of the specific crime in some active way.” *Id.* at 412 (emphasis in original) (internal quotation and citations omitted). Applying § 2's standard, he held that mere knowledge of illegal conduct coupled with a continued commercial relation was insufficient to establish aiding and abetting. *Id.* (citing *United States v. Schwartz*, 666 F.2d 461, 463-64 (11th Cir. 1982) (more than mere presence at scene of crime required for aiding and abetting); *United States v. Smith*, 631 F.2d 391, 395-96 (5th Cir. 1980) (wiping fingerprints off of a car purchased with stolen checks insufficient evidence to show aiding and abetting illegal possession of checks); and *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (more than mere presence at scene of sale of counterfeit treasury bill must be shown)).

322. 780 F.2d 267 (3d Cir. 1985). The court specifically upheld that the burden of proof in a civil RICO suit was by a preponderance of the evidence. *Id.* at 279 n.12.

323. *Id.* at 284.

324. *Id.* At a later point in its opinion, the court added:

We conclude that under RICO, an individual need not himself commit two requisite predicate offenses, as long as that same individual aids and abets the commission of the predicate offenses. Indeed, there is no authority to suggest that 18 U.S.C. § 2(a) does not apply to RICO.

*Id.* at 288 n.25 (emphasis added).

325. 782 F.2d 475 (5th Cir. 1986).

money against its accounts receivable and it arranged for SLT to supervise the borrower's inventory. SLT's agent, however, soon discovered the supplier was generating phony invoices to support additional advances. Nevertheless, SLT did not alert Armco, which then sued the borrower and SLT under RICO based on mail fraud for its substantial losses. Reversing a jury verdict for Armco, the Fifth Circuit held that mere silence on the part of SLT, while it permitted the fraud to succeed, was insufficient to uphold SLT's liability as an aider and abettor to the borrower's fraud under 18 U.S.C. § 2.<sup>326</sup> "To establish that Conklin [, the SLT agent,] violated the mail fraud statute as an aider and abettor, Armco [was required to prove] that Conklin was associated with the mailing of the bogus invoices, participated in it as something he wished to bring about and sought by his action to make it succeed."<sup>327</sup> "Mere negative acquiescence" was not, the Court held, sufficient.<sup>328</sup>

The water became muddy, however, after the Third Circuit's decision in *Petro-Tech, Inc. v. Western Co. of North America*.<sup>329</sup> Western attacked its alleged status as a possible aider and abettor in a false billing scheme implemented through the mails. Inexplicably, Judge Becker, an otherwise able jurist, examined the question as if it were open, despite *Local 560*'s authoritative treatment of the issue. More importantly, Judge Becker considered the issue to be the application of general common law principles to federal statutes rather than application of § 2 to RICO.<sup>330</sup> To be sure, he cited *Local 560*, but he miscited it as a criminal, not a civil, decision, commenting that the Third Circuit "already held that one can violate RICO criminally by aiding and abetting."<sup>331</sup> In addition, although Judge Becker noted *Armco Credit Corp.* and *Laterza*, he did not cite *Moss*.<sup>332</sup> The *Petro-Tech* court held: "We now join those courts, and hold that, if all of RICO's other requirements are met, an aider and abettor of two predicate acts can be civilly liable under RICO."<sup>333</sup> While Judge Becker acknowledged in his explanation of the Court's holding the existence of 18 U.S.C. § 2 (and its gloss in *Nye & Nissen*

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326. *Id.* at 487 ("The evidence shows nothing more than a man who unwisely closed his eyes and believed that an unpleasant situation was none of his affair."). A dissent by Judge Clark noted that the supposed "watchdog" participated in a "cover-up" that constituted the active suppression of information and breach of trust; for him, it constituted aiding and abetting.

327. *Id.* at 485 (citing *Nye & Nissen*, 336 U.S. at 619).

328. *Id.*

329. 824 F.2d 1349 (3d Cir. 1987).

330. *Id.* at 1356 (citing *American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556 (1982) (applying common law principles of "apparent authority to the antitrust statutes)). The citation to *American Soc'y of Mechanical Eng'rs* was inapposite because the antitrust statutes are not codified into positive law; they are free standing statutes that are compiled in an unofficial compilation, Title 15. No general provision of Title 15—codified or otherwise—provides for accomplice liability. RICO is, however, part of Title 18, which is codified, and § 2 applies accomplice liability throughout the Title. See *infra*, note 441 (discussing accomplice liability under RICO).

331. *Id.* The Third Circuit held, of course, that the criminal standard of 18 U.S.C. § 2 applied in *civil* RICO litigation. *Local 560* was, in fact, not criminal litigation.

332. *Id.*

333. *Id.*

and *Peoni*), he rested his opinion on general common law principles, and the civil standard for accomplice responsibility that he adopted was drawn from § 876(b) of the RESTATEMENT (SECOND) OF TORTS.<sup>334</sup> Nevertheless, after distinguishing the criminal and civil standards, he enigmatically observed in a footnote: "We deal here only with a question of whether or not the common law doctrine of aiding and abetting can apply under RICO. We have no occasion today to discuss the doctrine's reach or limitations."<sup>335</sup> Strangely, Judge Becker was oblivious that his circuit already decided in *Local 560* that the criminal standard, not the common law standard, was applicable, and its well-settled reach and limitations were already recognized and appropriately applied.<sup>336</sup> Unfortunately, *Petro-Tech* gave the wrong cue to the development of the law of accomplice liability in civil RICO litigation, and it, rather than *Local 560*, is the most often cited decision.<sup>337</sup>

## F. Criminal Conspiracy Liability

### 1. Introduction

Conspiracy liability is deeply rooted in federal criminal jurisprudence.<sup>338</sup> Currently, "[t]he basic conspiracy statute . . . is 18 U.S.C. § 371, which . . . makes it an offense to conspire to commit any offense against the United States, where one or more of the conspirators does 'any act to effect the object of the conspiracy.'"<sup>339</sup> In *Callanan v. United States*,<sup>340</sup> Justice Frankfurter offered this rationale of the separate treatment of conspiracy and the substantive offense:

This settled principle derives from the reason of things in dealing with socially reprehensible conduct: collective criminal agreement—partnership in crime—

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334. *Id.* at 1356 (liability "[f]or harm resulting in a third person from the tortious conduct of another . . . [can be imposed upon a party who] . . . knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself.").

335. *Id.* at 1356 n.9.

336. *But see* MATHEWS, *supra* note 306, § 10.04(4), at 10-26 ("Without directly and expressly so articulating it, the strong implication of the Third Circuit's *Petro-Tech* opinion is that strict criminal, not more diluted civil, versions of aiding and abetting principles apply to civil RICO."). On the contrary, "the strong implication" is that the civil standards apply.

337. *See, e.g.,* Oscar v. Univ. Students Co-op Ass'n, 939 F.2d 808, 809 n.1 (9th Cir. 1991) (citing *Petro Tech*, 824 F.2d at 1356-62) (aiders and abettors liable under civil RICO as principals)), *rev'd on other grounds*, 965 F.2d 783 (9th Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 655 (1992); Banks v. Wolk, 918 F.2d 418, 421 (3d Cir. 1990) ("RICO recognizes liability for those who merely aid and abet the underlying predicate offenses") (citing *Petro-Tech*, 824 F.2d at 1356-58).

338. 1970 WORKING PAPERS, *supra* note 213, at 386. In *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111, 123 (1842), Chief Justice Shaw gave "conspiracy" its classic definition: "[A] combination of two or more persons, by some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means." Shaw's definition was adopted by the Supreme Court in *Pettibone v. United States*, 148 U.S. 197, 203 (1893). *See also* *United States v. Gooding*, 25 U.S. (12 Wheat) 460, 469-72 (1827) (Story, J.).

339. S. REP. NO. 96-553 at 163 (1980).

340. 364 U.S. 587 (1961).

presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.<sup>341</sup>

## 2. *State of Mind*

Although the crime of conspiracy is 'predominantly mental in composition,' there has nonetheless always existed considerable confusion and uncertainty about precisely what mental state is required for [the] crime. The traditional definition of conspiracy does not focus upon the requisite state of mind, and the matter has often been dealt with ambiguously by the courts and has been largely ignored by the commentators.<sup>342</sup>

As with aiding and abetting, no state of mind is set out in the general federal conspiracy statute.<sup>343</sup> For a time, the circuit courts differed on whether the state of mind for conspiracy was "intent" or "knowledge." As with aiding and abetting, the split was represented by the views of Judge Learned Hand in *United States v. Falcone* and Judge John J. Parker in *Scales v. United States*.<sup>344</sup> Judge Hand in *Falcone* argued:

Civilly, a man's liability extends to any injuries which he should have apprehended to be likely to follow from his acts. . . . There are indeed instances of criminal liability of the same kind, where the law imposes punishment merely because the accused did not forbear to do that from which the wrong was likely to follow; but in prosecutions for conspiracy or aiding and abetting, his attitude towards the forbidden undertaking must be more positive. It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome. The distinction is especially important today when so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. We may agree morally the

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341. *Id.* at 593-94. See also *United States v. Feola*, 420 U.S. 671, 693-94 (1975); *Rabinowich*, 238 U.S. at 88.

342. LAFAYE & SCOTT, *supra* note 148, at 535 (citations omitted).

343. 18 U.S.C. § 371 (1994).

344. Compare *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir.) (intent required for conspiracy), *aff'd on other grounds*, 311 U.S. 205 (1940), with *Scales v. United States*, 227 F.2d 581, 587 (4th Cir. 1955) (knowledge required for conspiracy), *rev'd*, 335 U.S. 1 (1957).

defendants at bar should have refused to sell to illicit distillers; but both morally and legally to do so was *toto ceolo* different from joining with them in running the stills.<sup>345</sup>

While the Supreme Court never authoritatively resolved the aspect of *Falcone* requiring a stake in the venture, the Court's decision in *Direct Sales Co. v. United States*<sup>346</sup> squarely adopted the "intent" standard as the state of mind for conspiracy:

The commodities sold [*in Falcone*] were articles of free commerce . . . [T]hey were not in themselves restricted commodities, incapable of further legal use except by compliance with rigid regulations, such as apply to morphine sulphate. The difference is like that between toy pistols or hunting rifles and machine guns. . . . Gangsters, not hunters or small boys, comprise the normal private market for machine guns. So drug addicts furnish the normal outlet for morphine which gets outside the restricted channels of legitimate trade. The difference is important for two purposes. One is for making certain that the seller knows the buyer's intended illegal use. The other is to show that by the sale *he intends to further, promote and cooperate in it. This intent*, when given effect by overt act, *is the gist of conspiracy*.<sup>347</sup>

The circuit courts now uniformly use "intent" as the state of mind for conspiracy, although occasionally "knowledge" language can be found in the opinions.<sup>348</sup>

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345. *Falcone*, 109 F.2d at 581.

The Model Penal Code also adopts "intent" or "purpose" as the state of mind for conspiracy:

[Section 5.03 of the Code] requires in all cases a 'purpose to promote or facilitate' commission of the crime. . . . The purpose requirement is crucial to the resolution of the difficult problems presented when a charge of conspiracy is levelled against a person whose relationship to a criminal plan is essentially peripheral. Typical is the case of the person who sells sugar to the producers of illicit whiskey . . . [H]e must at least have knowledge of the use to which the materials are being put, but the difficult issue presented is whether knowingly facilitating the commission of a crime ought to be sufficient, absent a true purpose to advance the criminal end. In this case conflicting interests are also involved: that of the vendors in freedom to engage in gainful and otherwise lawful activities without policing their vendees, and that of the community in preventing behavior that facilitates the commission of crimes. . . . The considerations are the same whether the charge be conspiracy or complicity in the substantive crime . . . the actor must have 'the purpose of promoting or facilitating the commission of the crime.'

ALI, COMMENTARIES, *supra* note 148, at 403-04 (emphasis added).

Judge Hand mentions only in passing "morality." Regrettably, he did not explore the question further; it merits more extended treatment, as it raises some of the most pressing issues in a free, but diverse society. *See generally* APPENDIX F (MORALITY).

346. 319 U.S. 703 (1943). While the state of mind for conspiracy is "intent," conspiracy to engage in negligent conduct is possible. *See, e.g., United States v. Hansen-Sturm*, 44 F.3d 793, 795 (9th Cir. 1995) (disguising source of caviar is violation of Lacey Act; "conspirators [may] agree to conduct which they should have known was in violation of [the statute]").

347. 319 U.S. at 710-13 (emphases added).

348. *See, e.g., United States v. Lechuga*, 994 F.2d 346, 350 (7th Cir.) (conviction affirmed where drug seller sold cocaine through an intermediary to a third party buyer; the court noted that the conspiracy existed between the seller and his intermediary, not the seller and the buyer because the government did not prove that seller

While “intent” is the basic state of mind required for the “conduct” element of conspiracy, the state of mind for conspiracy for “surrounding circumstances”

intended for buyer to sell the cocaine to others;

What made ‘prolonged cooperation’ a factor in inferring conspiracy in [*Direct Sales*] was that it showed that the defendant not only knew that it was selling drugs to someone for use in an illicit enterprise, but had ‘join(ed) both mind and hand with him to make its accomplishment possible’ . . . . Prolonged cooperation is neither the meaning of conspiracy nor an essential element, but it is one type of evidence of an agreement that goes beyond what is implicit in any consensual undertaking, such as a spot sale.) (citations omitted),

*cert. denied*, 114 S. Ct. 482 (1993); *United States v. Superior Growers Supply, Inc.*, 982 F.2d 173, 179-80 (6th Cir. 1992) (dismissal of indictment affirmed for conspiracy to aid and abet manufacture of marijuana where defendants sold equipment that could be used to cultivate marijuana but prosecution failed to allege that the equipment was used for that purpose;

As *Falcone* and *Direct Sales* make clear, knowledge of the underlying crime and intent to further it are essential elements of a conspiracy to aid and abet a substantive crime. Furthermore, like the commodities sold in *Falcone*, the articles alleged for the means and method section of the indictment are articles of free commerce. Unlike the articles in *Direct Sales*, they do not individually have ‘inherently the same susceptibility to harmful and illegal use,’ and therefore do not by their nature put the seller on notice as to illegal use.”);

*United States v. Montanye*, 962 F.2d 1332, 1343 (8th Cir.) (affirming conviction for conspiracy to possess and distribute illegal drugs where defendant supplied glassware necessary to manufacture methamphetamine;

When a vendor sells sophisticated laboratory glassware to private individuals, he might suspect the motives of his customers. In this case, [defendant] not only suspected, but knew with certainty before delivering the glassware that he would be aiding an illegal conspiracy;

the court also upheld giving the following jury instruction:

It is not necessary that a person agree to play any particular part in carrying out the conspiracy. A person may become a member of a conspiracy even if that person agrees to play only a minor part in the conspiracy, such as driving a car or loading needed equipment, as long as you believe, beyond a reasonable doubt, that the person you are considering had an understanding of the unlawful nature of the plan and voluntarily and intentionally joined in it.),

*cert. denied*, 506 U.S. 957 (1992); *United States v. Medina*, 940 F.2d 1247, 1250 (9th Cir. 1991) (reversing conviction for conspiracy to distribute cocaine where defendant collected money due from drug transactions but was unaware that he was acting in furtherance of a conspiracy;

The Supreme Court has warned, ‘Without the knowledge, the intent cannot exist. . . . Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal. . . . This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning . . . a dragnet to draw in all substantive crimes.’ [Defendant] though perhaps guilty of some sort of conspiracy, was caught in an impermissible dragnet here because there is insufficient evidence that he had knowledge of the ultimate object of the conspiracy: to distribute cocaine. His conviction cannot stand.) (citations omitted);

*United States v. Garcia-Rosa*, 876 F.2d 209, 216 (1st Cir. 1989) (conspiracy conviction affirmed where defendant loaned money to an associate to finance heroin purchase and was repaid with drugs;

The ‘gist’ of conspiracy is the seller’s intent, through the sale, ‘to further promote and cooperate’ in the conspiracy. There is ample evidence to support the conclusion that [defendant] played an active, interested, and informed role in the conspiracy, and thereby crossed the ‘shadowy border between lawful cooperation and criminal association.’),

*vacated, sub nom.*, *Rivera-Feliciano v. United States*, 498 U.S. 954 (1990) (citations omitted); *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1191 (2d Cir. 1989) (conspiracy conviction affirmed in case involving

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manufacturer of adulterated fruit juice concentrate and purchaser of the concentrate who used it to manufacture fruit juice where the seller intended to defraud the purchaser;

If buyer and seller deal in a commodity that has limited legal uses, the very nature of the commodity may help to establish the parties' knowledge of and intent 'to further, promote, and cooperate' in the illegal scheme. Other aspects of the dealings between the parties, such as discounts, quantity sales, and a prolonged relationship, can also aid in proving that '(t)here is more than suspicion, more than knowledge . . . , (that t)here is informed and interested cooperation.'

(quoting *Direct Sales*, 319 U.S. at 711, 713), *cert. denied*, 493 U.S. 933 (1989); *United States v. Austin*, 786 F.2d 986, 989 (10th Cir. 1986) (conviction for conspiracy to distribute marijuana reversed and remanded with instruction to direct an acquittal where defendant sold ranch to drug smuggler without knowledge of the intended use and then became suspicious of illegal activity);

Although [defendant] candidly testified that . . . he had begun to suspect something illegal was going on, mere suspicion is not enough . . . . Here [defendant] was charged with conspiring to possess marijuana with the intent to distribute it. This record contains no evidence from which a fact finder could infer that [defendant] knew the focus of the conspiracy was marijuana, rather than the distribution of other contraband, or the aiding of illegal aliens, or other equally speculative illegal conduct, or even clandestine activity that did not violate the law.);

*United States v. Molovinsky*, 688 F.2d 243, 246 (4th Cir. 1982) (affirming conviction for conspiracy to counterfeit Federal Reserve notes where defendant sought printing facilities and a distribution network for counterfeit currency, but never possessed printing plates necessary to counterfeit; "A criminal object, specifically that unlawful utilization of facilities was intended, may be inferred from facts and circumstances proved at trial to the effect that the transactions did not conform in character to customary sales of free commodities."), *cert. denied*, 459 U.S. 1221 (1983); *United States v. Shoup*, 608 F.2d 950, 957-58 (3d Cir. 1979) (affirming conviction for conspiring to defraud United States by editing official report on election fraud to obtain voting machine repair business in the area, even though jury verdict rested on circumstantial evidence);

It is well-settled that *intent* to commit the substantive offense underlying an agreement may be inferred from the actions of the alleged conspirators. In *Direct Sales Co. v. United States* . . . [t]he Court held that the jury reasonably could have inferred an illegal *intent* on the part of the corporation to join and promote the objectives of an existing conspiracy from evidence that the corporation . . . sold unusually large quantities of morphine sulphate to a physician over an extended period of time. . . . It concluded 'there is no legal obstacle to finding that the supplier not only knows and acquiesces, but joins both mind and hand . . . to make its accomplishment possible. The step from knowledge to intent and agreement may be taken.' (citations omitted) (emphasis added).

*But see United States v. Frink*, 912 F.2d 1413, 1416, 1417 (11th Cir. 1990) (affirming conviction of automobile dealer who falsified titles, sold those automobiles to drug smugglers for cash and avoided filing the required currency transaction reports by depositing the cash payments in installments over several days;

In *Direct Sales* the Court recognized the continuing validity of *Falcone's* holding that mere knowledge by the seller that the buyer intends to use the commodity unlawfully, without more, will not support a charge of conspiracy. The Court held, however, that the government adequately proved a drug wholesaler's guilt of conspiracy because of the prolonged cooperation with the physician's purpose. Under those circumstances, 'the supplier not only knows and acquiesces, but joins both mind and hand with him to make its accomplishment possible. The step from knowledge to intent and agreement may be taken . . . .' While vehicles are not restricted in the same manner as are drugs under the narcotics statutes, the sale of vehicles requires documentation of the transaction. [Defendant] knowingly violated vehicle registration laws by listing false names and addresses on the registration forms. Deliberately falsified paperwork is even more indicative of guilty knowledge than the omission of paperwork in *Morse*, which we held supported an inference of intent. Although a single transaction of this type might not support a conviction of conspiracy, the sale of eleven vehicles with cash, all in-house deals, and the use of falsified documents on

varies with that required by the substantive offense;<sup>349</sup> a state of mind is not required for “surrounding circumstances” for a conspiracy where those elements in the substantive offense do not possess a state of mind requirement, that is, they are strict liability offenses.<sup>350</sup>

### 3. Conduct

“Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act.”<sup>351</sup> Two or more actors are required for an agreement.<sup>352</sup>

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vehicles [defendant] never saw provides substantial circumstantial evidence to support the inference of [defendant's] willing participation in the conspiracy.);

*United States v. Savaiano*, 843 F.2d 1280, 1293-94 (10th Cir.) (conviction affirmed where defendant knew the illegal purpose—manufacture of amphetamine—and located and arranged for a chemist to meet with the principal conspirator; “ ‘The essence of the crime of conspiracy is an agreement to violate the law.’ The evidence . . . need only establish the existence of a conspiracy and that the defendant knowingly contributed his efforts in furtherance thereof . . . [T]he defendant [must] knowingly and voluntarily [become] a part of the [conspiracy].”) (citations omitted), *cert. denied*, 488 U.S. 836 (1988); *United States v. Haldeman*, 559 F.2d 31, 112 (D.C. Cir. 1976) (affirming conviction for conspiracy to impede a grand jury investigation into the Watergate break-ins;

The judge first addressed the charge of conspiracy, telling the jury that one of the essential elements of the offense is ‘(t)hat each Defendant knowingly participated in this conspiracy *with the intent to commit the offense* or the fraud which was the object of the conspiracy. . . .’ This is a correct statement, for the specific intent required for the crime of conspiracy is in fact the intent to advance or further the unlawful object of the conspiracy.),

*cert. denied*, 431 U.S. 933 (1977); *United States v. James*, 494 F.2d 1007, 1024 (D.C. Cir.) (affirming conviction of police officer for conspiracy to engage in narcotics where the officer took bribes to protect the conspiracy;

The evidence showed that [the police officer] played a vital part in the conspiracy by protecting [the principal conspirator] and his enterprise from interference by the police. He did this with full knowledge of the nature of the unlawful enterprise, even though he might not have known the identity of all of the participants. This was enough to make him a party to the conspiracy.),

*cert. denied*, 419 U.S. 1020 (1974).

349. *See, e.g.*, *Ingram v. United States*, 360 U.S. 672, 678 (1959) (knowledge of tax liability required for conspiracy to evade lottery tax; “[C]onspiracy to commit a particular substantive offense cannot exist without *at least* the degree of criminal intent [that is, state of mind] necessary for the substantive offense itself”) (quoting *Note, Development in Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 939 (1959)); *see also* APPENDIX D (STATE OF MIND).

350. *See, e.g.*, *Feola*, 420 U.S. at 676 n.9 (no state of mind required for the jurisdictional element of federal officer status of a person under 18 U.S.C. § 111 (assault of federal officer) for either the substantive offense or a conspiracy to commit it); *United States v. Blassingame*, 427 F.2d 329, 330 (2d Cir. 1970) (no state of mind for jurisdictional element of interstate aspect of wire fraud under 18 U.S.C. § 1343), *cert. denied*, 402 U.S. 945 (1971).

351. *Iannelli v. United States*, 420 U.S. 770, 777 (1975). The state of mind required for conspiracy does not extend to knowledge that the act itself is unlawful. *See, e.g.*, *United States v. Blair*, 54 F.3d 639, 643 (10th Cir.) (need not know that the interstate transmission of gambling information was illegal under 18 U.S.C. § 1084) (citing *Feola*, 420 U.S. at 687), *cert. denied*, 116 S. Ct. 220 (1995).

352. *Morrison v. California*, 291 U.S. 82, 92 (1934); *Pettibone v. United States*, 148 U.S. 197, 203 (1893). The two parties to a conspiracy may be spouses. *United States v. Dege*, 364 U.S. 51, 54-55 (1960) (common law fiction of spousal unity abandoned); *United States v. Alzanki*, 54 F.3d 994, 1003 (1st Cir. 1995) (not plain error to convict husband of conspiracy to hold a household employee in involuntary servitude where wife appeared to be a freely participating party to conspiracy), *cert. denied*, 64 U.S.L.W. 3548 (1996).



While at common law an overt act was not necessary to complete a conspiracy,<sup>353</sup> an overt act is now generally required by statute.<sup>354</sup> Nevertheless, if a particular statute does not expressly require an overt act, none is required.<sup>355</sup> In *Yates v. United States*,<sup>356</sup> Justice John Harlan explained the function of the overt act requirement: "[It is] simply to manifest 'that the conspiracy is at work' and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence."<sup>357</sup>

#### 4. Capacity

As in the case of aiding and abetting, the scope of liability under conspiracy is greater than the scope of liability for the substantive offense, that is, a person may be guilty of *conspiring* to violate a statute that he could not substantively violate because of lack of capacity. In *United States v. Rabinowich*,<sup>358</sup> the Supreme Court upheld an indictment alleging conspiracy to conceal assets from a bankruptcy trustee where three of the six defendants were not themselves bankrupt. While the Court recognized that only a person adjudged as bankrupt could violate the bankruptcy statute, it found the indictment for conspiracy valid, holding that a person may be guilty of conspiring to violate a statute that he could not violate himself: "[A] person may be guilty of conspiring although incapable of committing the objective offense."<sup>359</sup> The decisions of the courts of appeals on conspiracy

353. *Hogan v. O'Neill*, 255 U.S. 52, 55 (1921); *Nash v. United States*, 229 U.S. 373, 378 (1913).

354. "[A] mere conspiracy, without overt act done in pursuance of it, is not criminally punishable under [§ 371]." *Rabinowich*, 238 U.S. at 86; see also *Pinkerton v. United States*, 328 U.S. 640, 647 (1946) (individual vicariously and substantively liable for conduct of coconspirator that is engaged in during the conspiracy, in furtherance of the conspiracy and that is foreseeable); "An overt act is an essential ingredient of the crime of conspiracy under . . . [§ 371] of the Criminal Code.").

355. *Singer v. United States*, 323 U.S. 338, 340 (1945).

356. 354 U.S. 298 (1957).

357. *Id.* at 334 (citation omitted); see also *Fiswick v. United States*, 329 U.S. 211, 216 (1946) (overt acts "mark the duration as well as the scope of the conspiracy"); 1970 WORKING PAPERS, *supra* note 213, at 392-393 (overt act "anchors the conspiracy in time and place").

358. 238 U.S. 78, 78 (1915).

359. *Id.* at 86. Compare *United States v. Holte*, 236 U.S. 140, 145 (1915) (Holmes, J.) (upholding indictment of female defendant for conspiring to violate the Mann Act by causing her own transportation across state lines to engage in prostitution even though the statute did not provide that women could be found guilty as principals;

[A] conspiracy with an officer or employee of the government or any other for an offense that only he could commit has been held for many years to fall within the conspiracy section. So a woman may conspire to procure an abortion upon herself when under the law she could not commit the substantive crime and therefore, it has been held, could not be an accomplice. So we think that it would be going too far to say that the defendant could not be guilty in this case. Suppose, for instance, that a professional prostitute, as well able to look out for herself as was the man, should suggest and carry out a journey within the act of 1910 [Mann Act, 18 U.S.C. § 398] in the hope of blackmailing the man, and should buy the railroad tickets, or should pay the fare from Jersey City to New York, she would be within the letter of the act of 1910 and we see no reason why the act should not be held to apply.)

(citations omitted), with *Gebardi*, 287 U.S. at 123 (conviction of female defendant for conspiring to violate the

uniformly reflect these principles.<sup>360</sup>

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Mann Act reversed where she willingly crossed state lines to have sex with the other defendant, a man who was not then her husband; citing the common law rule of *Queen v. Tyrrell*, 1 Q.B. 710 (1894); female not within class who could aid or abet or conspire in her own statutory rape). Distinguishing *Holte*, the *Gebardi* Court held that "[t]hose exceptional circumstances envisaged in *United States v. Holte*, . . . as possible instances in which the woman might violate the act itself, are clearly not present here. There is no evidence that she purchased the railroad tickets or that hers was the active or moving spirit in conceiving or carrying out the transportation. The proof shows no more than she went willingly upon the journeys for the purposes alleged." *Gebardi*, 287 U.S. at 117. Incorporating the common law tradition into the interpretation of the Mann Act, and reading an exception into the Act that limited liability for women, the Court observed:

Congress set out in the Mann Act to deal with cases which frequently, if not normally, involve consent and agreement on the part of the woman to the forbidden transportation. In every case in which she is not intimidated or forced into the transportation, the statute necessarily contemplates her acquiescence. Yet this acquiescence . . . was not made a crime under the Mann Act itself. Of this class of cases we say that the substantive offense contemplated by the statute itself involves the same combination or community of purpose of two persons only which is prosecuted here as a conspiracy. . . . [W]e perceive in the failure of the Mann Act to condemn the woman's participation in those transportations which are effected with her mere consent, evidence of an affirmative legislative policy to leave her acquiescence unpunished. We think it a necessary implication of that policy that when the Mann Act and the conspiracy statute came to be construed together, as they necessarily would be, the same participation which the former contemplates as inseparable incident of all cases in which the woman is a voluntary agent at all, but does not punish, was not automatically to be made punishable under the latter. It would contravene that policy to hold that the very passage of the Mann Act effected a withdrawal by the conspiracy statute of that immunity which the Mann Act itself confers.

*Id.* at 121-123.

360. See, e.g., *United States v. Spittler*, 800 F.2d 1267, 1275-1276 (4th Cir. 1986) (affirming conspiracy conviction for extortion where defendant was both the target of the extortion and a co-conspirator instrumental in causing the extortion to occur;

We affirm [defendant's] conviction of aiding and abetting and conspiracy to commit extortion because [defendant] cannot be deemed a mere extortion victim whose conduct . . . Congress chose not to criminalize under statutes proscribing aiding and abetting and conspiracy. . . . [T]he Hobbs Act, like the Mann Act construed in *Gebardi*, may be interpreted as not intended to punish the 'victim' of the crime. . . . [T]he statute's prescription of punishment solely for the extortioner indicates that Congress may not have intended to criminalize the acquiescence of extortion victims . . . . When an individual protected by such legislation exhibits conduct more active than mere acquiescence, however, he or she may depart the realm of a victim and may unquestionably be subject to conviction for aiding and abetting and conspiracy. . . . As a result, because we hold . . . that defendant . . . is not a victim, we conclude the . . . evidence . . . properly provided a basis for defendant's conspiracy convictions.) (citations omitted);

*United States v. Tenorio-Angel*, 756 F.2d 1505, 1513 (11th Cir. 1985) (affirming conviction for conspiracy to possess cocaine with intent to distribute where defendant challenged the sufficiency of the jury instruction regarding conspiracy;

A person may be guilty of conspiring to commit an offense although incapable of actually committing that offense. The language of the challenged instruction thus reflects that it is sufficient to agree to try to commit an illegal act even though one may not be capable of actually committing it.) (citations omitted);

*United States v. Albert*, 675 F.2d 712, 715-716 (5th Cir. 1982) (motion for acquittal reversed where defendant, a licensed physician, conspired with patients and others to illegally dispense controlled substances; court rejected defendant's contention that for a conspiracy to exist, all members must be capable of violating the substantive offense;

[Defendant] argues that laypersons . . . cannot conspire to dispense drugs illegally, since the law against dispensing applies only to medical practitioners. . . . The essence of [defendants'] argument

misses the point that '(a) person may be guilty of conspiring, although incapable of committing the substantive offense.' Thus the [laypersons] need not themselves be able to dispense drugs. Rather, they must only have knowingly 'participate(d) in a conspiracy with [defendant], a licensed physician, to dispense controlled substances in violation of [the statute].) (citations omitted);

*United States v. Lester*, 363 F.2d 68, 73 (6th Cir. 1966) (utilizing 18 U.S.C. § 2(b), the court upheld a § 371 conspiracy conviction on innocent agency theory where defendants were unable to commit the substantive crime;

[We do not] discern any rationale for refusing, as appellants suggest, to apply the conspiracy statute (18 U.S.C. § 371) to crimes made punishable by 18 U.S.C. § 2(b). So long as anyone who 'willfully causes an act to be done,' which, 'if directly performed by him or another would be an offense against the United States', is punishable as a principal, it follows a fortiori that when two or more persons conspire willfully to 'cause' an act forbidden by § 2(b), they *ex necessitate* conspire to 'commit (an) offense against the United States' within the meaning of 18 U.S.C. § 371.'),

*cert. denied*, 385 U.S. 1002 (1967); *Brown v. United States*, 204 F.2d 247, 250 (6th Cir. 1953) (affirming conviction of a loan shark for conspiring with the local sheriff to violate citizens' civil rights by arresting and incarcerating debtors to collect money due, even though only the sheriff was able to commit the substantive offense;

Appellant claims that, since he is a private citizen not shown to be acting under color of law, he cannot be found guilty of violating 18 U.S.C. § 242, because the constitutional rights protected in § 242 are secured against the state and persons acting in the name of the state, rather than against private persons. Therefore, he urges that he cannot be guilty of conspiracy to violate § 242. This contention ignores the fact that appellant was convicted not under § 242 but under § 371 . . . . An agreement between state law enforcement officers and others to engage in such extortion under color of state law is a conspiracy to violate § 242 under 18 U.S.C. § 371. . . . The fact that appellant was a private citizen and legally incapable of violating § 242 does not render him immune from a charge of violating 18 U.S.C. § 371 by engaging in an agreement with a law enforcement officer acting under color of state law to violate . . . § 242.) (citations omitted);

*Richards v. United States*, 193 F.2d 554, 555-556 (10th Cir. 1951) (affirming convictions for conspiring to violate provisions of the Harrison Narcotic Act, 26 U.S.C. § 2550 *et. seq.*, by using false representations and writings to purchase and procure narcotics, even though appellants did not themselves violate the statute;

It is contended that the narcotics were obtained on prescriptions issued by a physician registered under the Act, therefore the defendants could not be guilty of a crime of conspiracy to violate the provisions of the Act for the reason that purchases of this nature were not prohibited. . . . Conceding that the procurement of prescriptions for narcotics by an addict for his own use is not a crime, still conspiracy is a separate and different offense from the crime which is the object of the conspiracy, and addicts and others may be guilty of a conspiracy to effect a violation of law relating to the sale and transfer of narcotics even though they could not be guilty of a substantive offense.),

*cert. denied*, 343 U.S. 930 (1952); *May v. United States*, 175 F.2d 994, 1003-04 (D.C. Cir.) (affirming conviction for aiding and abetting and conspiracy to defraud the United States where employees of corporations, in exchange for money, received preferential treatment from defendant, a congressman and Chairman of the House Committee of Military Affairs;

'[A] conspiracy with an officer or employee of the government or any other for an offense that only he could commit has been held for many years to fall within the conspiracy section. . . . '[A]pplying the language of Justice Holmes in the *Holte* case, 'only the government employee could commit the act which was the object of the conspiracy.' There could therefore be a conspiracy between one not an officer and the said officer to commit the crime which said officer alone could commit. . . . We have before us a conspiracy between private persons and an officer of the Government to commit an offense which he alone could commit.),

*cert. denied*, 338 U.S. 830 (1949); *Ex parte O'Leary*, 56 F.2d 515, 516 (7th Cir. 1931) (petitioners denied bail pending a hearing challenging the sufficiency of their indictment for conspiracy to bribe a public official;

Petitioners argument necessarily assumed that the conspirators named in this indictment were both participants in the crime of accepting a bribe or in the crime of giving the bribe. Inasmuch as the

### 5. *Plurality and Intracorporate Conspiracy*

A plurality of actors must exist to support a conspiracy conviction.<sup>361</sup> Whether the plurality requirement is met may be problematic when a corporation is one of the alleged conspirators.<sup>362</sup> Under elementary agency principles, a corporation is personified through the acts of its agents; thus, the acts of its agents become the acts of the corporation as a single entity. Historically, a plurality did not exist when a corporation and a single agent were the only parties involved.<sup>363</sup> Nor did one exist when the alleged parties consisted of two corporations and one person acting as an agent for both.<sup>364</sup> Courts consistently hold, therefore, that a corporation and

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statute which defines the crime only applies to the recipient under one section and only applies to the giver under the other, the contention is fallacious. In other words, applying the language of Justice Holmes in the *Holte* case, 'only the government employee could commit the act which was the object of the conspiracy.' There could be a conspiracy between one not an officer and the said officer to commit the crime, which the said officer alone could commit.);

*Downs v. United States*, 3 F.2d 855, 857 (3d Cir.) (affirming convictions of two private citizens and two treasury agents for conspiring to interfere with the execution of a search warrant for intoxicating liquor during prohibition although the statute could only be substantively violated by the two defendants who were Treasury Agents;

Taking the testimony as a whole, it is quite clear that [the private citizens] were the leading spirits and the government officers the willing tools in the conspiracy . . . [T]he fact that [the private citizens], who were not government officers, and could not themselves have been convicted of the crime committed by [defendants] who were government officers, . . . [does not] prevent[] them from being convicted of joining in a conspiracy to have the latter commit such crime. In that regard we agree with the principle set forth in *Johnson v. United States* where it was said: 'A defendant, therefore, may be convicted of a conspiracy to commit an offense, when, in the nature of things, he could not have committed the offense himself, if it be an offense which one of his co-conspirators could commit.' ''

*cert. denied*, 268 U.S. 689 (1925) (citation omitted); *Carter v. United States*, 19 F.2d 431, 433 (8th Cir. 1927) (affirming convictions for conspiracy to conceal assets of a bankrupt corporation from the bankruptcy trustee; "Persons who are not bankrupts may be guilty of conspiracy to conceal property from the trustee."); *Vannata v. United States*, 289 F. 424, 426 (2d Cir. 1923) (affirming conviction for conspiring to sell illegal whiskey when defendant was the only party indicted for conspiracy;

Neither is it a good objection to this prosecution for conspiracy to commit a crime that only one of those named, or indicated by the phrase 'others to the grand jurors unknown,' could possibly perform the ultimate illegality; i.e., the sale by [defendant]. It is confederation that constitutes the crime of conspiracy at common law; our statute adds an overt act, whether as an ingredient of crime or as a condition precedent to indictment, is a mere piece of metaphysics.).

361. *Morrison*, 291 U.S. at 92; *Pettibone*, 148 U.S. at 203.

362. See generally, Sarah N. Welling, *Intracorporate Plurality in Criminal Conspiracy Law*, 33 HASTINGS L.J. 1155, 1158-67 (1982) (dividing the intracorporate conspiracy issue into two distinct questions: (1) when one agent acts alone within the scope of corporate business, do the agent and the corporation constitute a plurality?; and (2) when two or more agents of a single corporation act together in furtherance of the corporation's business, is a plurality established?).

363. See, e.g., *Union Pac. Coal Co. v. United States*, 173 F. 737, 745 (8th Cir. 1909) ("[T]he distinction between the commission of an offense and a combination to commit it by a corporation vanishes into thin air . . .").

364. See, e.g., *United States v. Santa Rita Store Co.*, 113 P. 620, 620-21 (N.M. 1911) (antitrust) (requiring more than one agent to find conspiracy involving two corporations).

only one of its agents do not constitute a plurality for criminal conspiracy.<sup>365</sup> When analyzing the rationale for the intracorporate conspiracy doctrine, courts usually follow the rule that a corporation can, however, conspire with two or more of its agents, and they refuse to extend the intracorporate conspiracy exception to insulate corporations from liability for criminal conspiracy when the conspiracy involves a corporation and multiple agents.<sup>366</sup> Nevertheless, an intra-corporate

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365. See, e.g., *United States v. Stevens*, 909 F.2d 431, 433 (11th Cir. 1990) (reversing conspiracy conviction of corporation and its sole stockholder;

In the great majority of reported decisions involving intracorporate conspiracies under § 371, there were multiple human conspirators in addition to the corporate coconspirator. Some cases have expressly indicated that multiple actors must be involved. The argument that a single human actor can be convicted of conspiracy under § 371 under the circumstances of this case flies in the face of the traditional justification for criminal conspiracies. Conspiracy is a crime separate from the substantive criminal offense which is the purpose of the conspiracy. This separate punishment is targeted not at the substantive offenses themselves, but at the danger posed to society by combinations of individuals acting in concert. This settled principle derives from the reason of things in dealing with socially reprehensible conduct: collective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts. . . . The threat posed to society by these combinations arises from the creative interaction of two autonomous minds. It is for this reason that the essence of conspiracy is agreement. The societal threat is of a different quality when one human simply uses the corporate mechanism to carry out his crime. The danger from agreement does not arise.”) (citations omitted).

366. See, e.g., *United States v. Hughes Aircraft Co.*, 20 F.3d 974, 979 (9th Cir.) (refusing to adopt intracorporate conspiracy doctrine to insulate a corporation and multiple agents from criminal conspiracy liability;

We hold that a corporation may be liable under § 371 for conspiracies entered into by its agents and employees . . . [Defendant] . . . contends that we should extend the reach of the intracorporate conspiracy doctrine in antitrust law, which holds that a conspiracy requires ‘an agreement among two or more persons or distinct business entities.’ . . . However, this doctrine has never been applied to criminal cases. As the First Circuit noted, ‘There is a world of difference between invoking the fiction of corporate personality to subject a corporation to civil liability for acts of its agents and invoking it to shield a corporation or its agents from criminal liability where its agents acted on its behalf.’ . . . Every other circuit to address the issue has come to the same conclusion. . . . We decline to extend the intracorporate conspiracy doctrine to criminal activity.) (citations omitted), *cert. denied*, 115 S. Ct. 482 (1994);

*United States v. Ames Sintering Co.*, 927 F.2d 232, 236-37 (6th Cir. 1990) (affirming wire fraud conviction of corporation and multiple agents for bid rigging conspiracy); *United States v. Mahar*, 801 F.2d 1477, 1488 & n. 19 (6th Cir. 1986) (affirming conviction of corporation and agents for conspiring to illegally distribute controlled pharmaceutical drugs;

A corporation acts through its officers, agents and servants when such acts are performed within the scope of and in the course of the duties or employment of such officer, agent and employee. The evidence indicated, and the jury was entitled to find, that [the agents] each performed acts within the scope of and in the course of the corporate duties or employment of each individual defendant. Hence, the jury was entitled to impute to the [defendant corporation] any criminal act of each individual defendant. It is noted that this circuit has held ‘that in the criminal context a corporation may be convicted of conspiring with its officers.’ ”) (citations omitted);

*United States v. Hugh Chalmers Chevrolet-Toyota*, 800 F.2d 737, 738 (8th Cir. 1986) (affirming conviction of auto dealership and its agents for conspiracy to tamper with odometers;

The dealership . . . claims that a corporate entity cannot be subject to criminal prosecution for

conspiracy exception is sometimes applied to defeat liability. In *Nelson Radio and Supply Co. v. Motorola*,<sup>367</sup> the Fifth Circuit first held that an intracorporate conspiracy exception existed to the plurality requirement for antitrust conspiracy, that is, no plurality was present where two agents of the same corporation conspired together.

It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the

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conspiracy solely among its own agents. We disagree. This court has recently rejected an identical argument and held that a corporation may be responsible when two or more high ranking or authoritative agents engage in a criminal conspiracy on its behalf.” (citations omitted); *United States v. American Grain & Related Indus.*, 763 F.2d 312, 320 (8th Cir. 1985) (conspiracy to convert grain pledged to the federal government; “[A] corporation can be convicted of criminal conspiracy for the acts of two or more of its agents ‘conspiring together on behalf of the corporation.’” (citations omitted);

*United States v. Peters*, 732 F.2d 1004, 1008 & n.7 (1st Cir. 1984) (affirming conspiracy conviction of corporation and multiple agents for defrauding insurance company;

The actions of two or more agents of a corporation, conspiring together on behalf of the corporation, may lead to conspiracy convictions of the agents (because the corporate veil does not shield them from criminal liability) and of the corporation (because its agents conspired on its behalf) . . . . These cases reject the syllogism, at least in the criminal context, that since the acts of the corporate officers constitute acts of the corporation, and since a corporation cannot conspire with itself, it cannot conspire with its officers.);

*United States v. S & Vee Cartage Co.*, 704 F.2d 914, 920 (6th Cir. ) (affirming conviction of corporation and multiple agents for conspiring to defraud the government;

We hold that in the criminal context a corporation may be convicted of conspiring with its officers. . . . Statements made in antitrust cases to the effect that a corporation is incapable of conspiring with its agents generally have been distinguished as limited in application to the concept of ‘enterprises’ found in § 1 of the Sherman Act. . . . The law views [defendant corporation] as a distinct legal entity, separate from [agent defendants]. It is, therefore, possible for a conspiracy to exist between these parties.) (citations omitted), *cert. denied*, 464 U.S. 935 (1983);

*Hartley*, 678 F.2d at 970 (in RICO prosecution, noting corporation could be held liable for criminal conspiracy involving single corporation and multiple agents;

The difficulty in accepting the theory of intracorporate conspiracy is conceptual . . . . The conceptual difficulty is easily overcome, however, by acknowledging the underlying purpose for the creation of this fiction—to expand corporate responsibility. By personifying a corporation, the entity was forced to answer for its negligent acts and to shoulder financial responsibility for them. . . . The fiction was never intended to prohibit the imposition of criminal liability by allowing a corporation or its agents to hide behind the identity of the other. We decline to expand the fiction only to limit corporate responsibility in the context of the criminal conspiracy now before us.) (citations omitted);

*Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 602-04 (5th Cir. 1981) (holding that Louisiana antitrust law does not recognize corporate conspiracy exception and exploring the rationale for holding corporations criminally liable for conspiracies outside of antitrust area; “In these situations, the action by an incorporated collection of individuals creates the ‘group danger’ at which conspiracy liability is aimed, and the view of the corporation as a single legal actor becomes a fiction without a purpose.”).

367. 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953).

acts of the corporation.<sup>368</sup>

Departing from the general rule for corporate criminal conspiracy, the Supreme Court followed *Nelson* in the antitrust conspiracy case, *Copperweld Corp. v. Independence Tube Corp.*<sup>369</sup> The Court held that it was impossible for a corporation to conspire unilaterally with its own agent, multiple agents, or with wholly-owned subsidiaries under the Sherman Act:

[T]he appropriate inquiry requires us to explain the logic underlying Congress' decision to exempt unilateral conduct from § 1 scrutiny, and to assess whether that logic similarly excludes the conduct of a parent and its wholly owned subsidiary. Unless we second-guess the judgment of Congress to limit § 1 to concerted conduct, we can only conclude that the coordinated behavior of a parent and its wholly owned subsidiary falls outside the reach of that provision.<sup>370</sup>

The Court based its holding on the language and purpose of the Sherman Act:

Any reading of the Sherman Act that remains true to the Act's distinction between unilateral and concerted conduct will necessarily disappoint those who find that distinction arbitrary. It cannot be denied that § 1's focus on concerted behavior leaves a "gap" in the Act's proscription against unreasonable restraints of trade. . . . An unreasonable restraint of trade may be effected not only by two independent firms acting in concert; a single firm may restrain trade to precisely the same extent if it alone possesses the combined market power of those same two firms. Because the Sherman Act does not prohibit unreasonable restraints of trade as such—but only restraints effected by a contract, combination, or conspiracy—it leaves untouched a single firm's anti-competitive conduct (short of threatened monopolization) that may be indistinguishable in economic effect from the conduct of two firms subject to § 1 liability.<sup>371</sup>

The intracorporate conspiracy exception also finds limited acceptance in civil rights conspiracies.<sup>372</sup> One view is that the agents of a single corporation cannot constitute the plurality necessary for conspiracy under § 1985(3).<sup>373</sup>

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368. *Id.* at 914.

369. 467 U.S. 752 (1984).

370. *Id.* at 776.

371. *Id.* at 774-775 (citation omitted).

372. See 42 U.S.C. § 1985(3) (1994) (granting cause of action to person injured by conspiracy depriving him of his civil rights).

373. The leading case is *Dombrowski v. Dowling*, 459 F.2d 190, 196 (7th Cir. 1972) (§ 1985(3) case dismissing civil rights claim because plurality requirement was not established by multiple agents conspiring with corporation; and holding that the statutory requirement of "two or more persons" was "not satisfied by proof that a discriminatory business decision reflects the collective judgment of two or more executives of the same firm." The court further stated that [w]e do not suggest that an agent's action within the scope of his authority will always avoid a conspiracy finding . . . . But if the challenged conduct is essentially a single act of discrimination by a single business entity, the fact that two or more agents participated in the decision or in the act itself will normally

### G. Civil Conspiracy Liability

Traditionally, the common law recognized the theory of civil conspiracy.<sup>374</sup> The RESTATEMENT (SECOND) OF TORTS § 876 reflects common law liability for torts committed through a concert of action: "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . does a tortious act in concert with the other or pursuant to a common design with him."<sup>375</sup> Much of the confusion in the development of the jurisprudence of civil conspiracy, however, stems from the recurring debate over the status of conspiracy itself as a substantive tort.<sup>376</sup> The majority view is that it is the tortious act that causes the

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not constitute the conspiracy contemplated by this statute.") Other circuits follow *Dombrowski*. See, e.g., *Buschi v. Kirven*, 775 F.2d 1240, 1251 (4th Cir. 1985) (affirming summary judgment for defendant corporation as to § 1985(3) claim); *Rice v. President and Fellows*, 663 F.2d 336, 338 (1st Cir. 1981) (affirming dismissal of § 1985(3) conspiracy claim alleging that defendant intentionally awarded lower grades to female law students; "The fatal defect in this claim is that [plaintiff] has sued only the President and Fellows of Harvard College, which is a single corporate entity and, therefore, unable to conspire with itself in violation of § 1985(3)."), *cert. denied*, 456 U.S. 928 (1982); *Girard v. 94th St. & Fifth Ave. Corp.*, 530 F.2d 66, 71 (2d Cir.), (same; gender discrimination), *cert. denied*, 425 U.S. 974 (1976); *Baker v. Stuart Broadcasting Co.*, 505 F.2d 181, 183 (8th Cir. 1974) (affirming dismissal of § 1985(3) claim where alleged conspiracy involved a single company and its agents). Professor Sarah Welling criticizes *Dombrowski* and its progeny for an absence of meaningful analysis to justify extension of the intracorporate conspiracy doctrine, which is best rooted in the peculiarities of the economic policy of the antitrust area, not in the general theory applicable to civil rights conspiracy law. Welling, *supra* note 362, at 1170. While *Dombrowski* is the majority rule, other circuits appropriately find its approach unacceptable. Refusing to manipulate the language of the decision to create exceptions to the intracorporate conspiracy doctrine for § 1985(3) claims, the Third Circuit rejected *Dombrowski* outright and held correctly that agents of a single corporation can compose the plurality necessary for a civil rights conspiracy. *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 584 F.2d 1235, 1256-59 (3d Cir. 1978) (intracorporate conspiracy doctrine does not insulate corporation and its agents from liability under § 1985(3);

[The final defense against plaintiff's claims] finds its basis in the theory that the defendants are immune to suits under § 1985(3) because the alleged combination occurred among officers and directors of a single corporation. . . . This contention finds no support in the language of § 1985(3). On its face, the statute requires simply that 'two or more persons' conspire in order to come within its proscription. . . . We see nothing in the policies undergirding § 1985(3) that would support such an argument. If, as seems clear under § 1985(3), the agreement of three partners to use their business to harass any blacks who register to vote constitutes an actionable conspiracy, we can perceive no function to be served by immunizing such action once a business is incorporated. . . . [S]ince neither considerations of policy nor force of precedent require adherence to the defendants' stance, we do not follow the line of cases adopting the rule that concerted action among corporate officers and directors cannot constitute a conspiracy under § 1985(3).")

(citations omitted), *vacated on other grounds*, 442 U.S. 366 (1979).

374. See, e.g., *Truax v. Corrigan*, 257 U.S. 312, 327 (1921) (finding conspiracy where object or means used are unlawful "concert of action" (citing *Pentibone*, 148 U.S. at 203)); *National Fireproofing Co. v. Mason Builders' Assoc.*, 169 F.259, 264 (2d Cir. 1909) (" 'civil conspiracy' is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means").

375. See, e.g., *Halberstam*, 705 F.2d at 477 & n.6 (holding common law wife vicariously liable as civil conspirator for murder committed by husband during break-in; "The RESTATEMENT [(SECOND) OF TORTS § 876] explains in 'Comment [b] on Clause (a),' that the term 'conspiracy' is often used to refer 'to a common design or plan for cooperation in a tortious line of conduct or to accomplish a tortious end.' "); *Pharo v. Smith*, 621 F.2d 656, 669 (5th Cir. 1980) (acknowledging that Clause (a) of Restatement § 876 "embraces" civil conspiracy).

376. RESTATEMENT (SECOND) OF TORTS § 876; see generally Jerry Whitson, Note, *Civil Conspiracy: A*



damage that is the essence of civil conspiracy; thus, the injured party possesses a claim for relief with or without proof of the conspiracy.<sup>377</sup> The other point of view conceives of civil conspiracy as an independent tort, that is, that the combination of two or more persons, is the essence of the claim for relief.<sup>378</sup> Indeed, even those who argue that injury by an independently tortious act is required, recognize a "force of numbers" exception.<sup>379</sup> A civil conspiracy is not actionable under either view, however, unless the agreement is accompanied by an overt act that causes damage to the plaintiff.<sup>380</sup> Because an agreement without an overt act resulting in an injury is not itself actionable, civil conspiracy may be best thought of as a theory of secondary liability.<sup>381</sup> Once a civil conspiracy is shown, the coconspirators are liable for the full extent of the victim's injury, even though they were not personally caused by the defendant.<sup>382</sup> A federal claim for relief for a civil

*Substantive Tort?*, 59 B.U. L. REV. 921, 923-24 (1979) (discussing civil liability for conspiracy); T. Raworth Williamson, Jr., *The Resulting Confusion from the Varied Development of Civil Conspiracy*, 23 GA. B.J. 48 (1961) (same).

377. See, e.g., *Board of Education v. Hoek*, 183 A.2d 633, 646 (N.J. 1962) (requiring no direct proof of conspiracy for conviction); Prosser, *supra* note 290, at 324 ("The gist of the action is not the conspiracy charged, but the tort working damage to the plaintiff.") (citing *James v. Evans*, 149 F. 136, 140 (3d Cir. 1906) ("It is only where means are employed or purposes are accomplished which are themselves tortious, that the conspirators who have not acted but have promoted the act will be held liable.") (citations omitted)).

378. Williamson, *supra* note 376, at 549-50; see, e.g., *Cooper v. O'Connor*, 99 F.2d 135, 142 (D.C. Cir.) ("The essence of conspiracy is an agreement . . ."), *cert. denied*, 305 U.S. 643 (1938).

379. See, e.g., *Deslauries v. Shea*, 13 N.E.2d 932, 935 (Mass. 1938) ("There can be no independent tort for conspiracy unless in a situation 'where mere force of numbers acting in unison or other exceptional circumstances may make a wrong.'"). See also *Aetna Cas. Serv. Co. v. P. & B. Autobody*, 43 F.3d 1546, 1503-05 (1st Cir. 1994) (discussion of civil conspiracy).

380. See, e.g., *Nalle v. Oyster*, 230 U.S. 165, 182 (1913) (civil conspiracy action for libel against school board by dismissed teacher; "the well settled rule is that no civil action lies for a conspiracy unless there be an overt act that results in damage to the plaintiff."); *Hooks v. Hooks*, 771 F.2d 935, 944 (6th Cir. 1985) (civil conspiracy action by mother against husband, in-laws and police for depriving her of children's custody through false criminal charges; "[a]ll that must be shown is that there was a single plan, that the alleged coconspirator shared in the general conspiratorial objective, and that an overt act was committed in furtherance of the conspiracy that caused injury to the complainant."); see generally G. Robert Blakey, *Debunking RICO's Myriad Myths*, 64 ST. JOHN'S L. REV. 701, 721 n.111 (1990) (discussing civil conspiracy).

381. See, e.g., *Halberstam*, 705 F.2d at 479 ("Since liability for civil conspiracy depends on performance of some underlying tortious act, the conspiracy is not independently actionable; rather, it is a means for establishing vicarious liability . . ."); Prosser, *supra* note 290, at 323-324:

All those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt the wrongdoer's acts done for their benefit, are equally liable. . . . It is in connection with such vicarious liability that the word conspiracy is often used." (citations omitted);

RESTATEMENT (SECOND) OF TORTS § 876, cmt. a ("The theory at the early common law was that there was a mutual agency of each to act for the others, which made all liable for the tortious acts of any one.").

382. See, e.g., *Kashi v. Gratsos*, 790 F.2d 1050, 1054 (2d Cir. 1986) (finding defendant liable in a common law fraud action for full extent, not personal involvement); *Hooks*, 771 F.2d at 943-44 ("A civil conspiracy is an agreement between two or more persons to injure another by unlawful action. Express agreement among all the conspirators is not necessary to find the existence of a civil conspiracy. Each conspirator need not have known all the details of the illegal plan or all of the participants involved."); *Halberstam*, 705 F.2d at 481 (stating that

As to the extent of liability, once the conspiracy has been formed, all its members are liable for

conspiracy may arise from common law or other primary jurisdiction.<sup>383</sup> Otherwise, it arises only from an express statutory provision.<sup>384</sup>

### *H. RICO Criminal And Civil Conspiracy Liability*

RICO contains its own conspiracy provision.<sup>385</sup> The inclusion of § 1962(d) provides a new, substantive objective for the jurisprudence of conspiracy, that is, the "enterprise conspiracy"; it also eliminates the requirement of an overt act, and it makes enhanced sanctions possible.<sup>386</sup> While the pre-*Reves* accomplice jurisprudence was not remarkably well-developed, the conspiracy jurisprudence under RICO flowered, but it produced sharply conflicting opinions on a number of issues in both criminal and civil litigation.

#### *1. Objective*

Pre-*Reves*, the seminal discussion of RICO conspiracy came in *United States v.*

injuries caused by acts pursuant to or in furtherance of the conspiracy. A conspirator need not participate actively in or benefit from the wrongful action in order to be found liable. He need not even have planned or known about the injurious action, . . . so long as the purpose of the tortious action was to advance the overall object of the conspiracy);

*Ferguson v. Omnimedia*, 469 F.2d 194, 197 (1st Cir. 1972) (recognizing that co-conspirators are liable for each other's acts; "[i]f [defendant] took part in a conspiracy, she may be held responsible for the acts of a co-conspirator that actually misled the appellant into buying stock . . . even if she herself did not participate in those acts."); *Shell v. Hensley*, 430 F.2d 819, 827 n. 13 (5th Cir. 1970) (holding all members of conspiracy jointly and severally liable for all injuries, whether or not caused by their own overt acts; "[h]aving allegedly joined the conspiracy and taken steps to assure its success, [defendant] may be held responsible for the acts of his coconspirators in furtherance of their scheme."); see also *Beltz Travel Serv. v. International Air Transp. Ass'n*, 620 F.2d 1360, 1366 (9th Cir. 1980) (antitrust; each conspirator is liable for acts of his coconspirators) (citing *United States v. Patten*, 226 U.S. 525, 544 (1913) (antitrust)).

383. See, e.g., U.S. CONST. art. I, § 8; *Halberstam*, 705 F.2d at 472 (discussing common law conspiracy cases).

384. See, e.g., *Griffin v. Breckenridge*, 403 U.S. 88, 103 (1971) (discussing constitutionality of 42 U.S.C. § 1985(3)); *Simeon v. T. Smith & Son*, 852 F.2d 1421, 1430-32 (5th Cir. 1988) (maritime law under Jones Act, 46 U.S.C. § 688; finding liability not limited to percentage of fault), *cert. denied*, 490 U.S. 1106 (1989); *Ostrofe v. H.S. Crocker Co.*, 740 F.2d 739, 744 (9th Cir. 1984) (antitrust) (allowing claim against all conspirators although injury was caused solely by the actions of one), *cert. denied*, 469 U.S. 1200 (1984); *Beltz Travel Serv.*, 620 F.2d at 1366 (finding all members of anti-trust conspiracy liable, regardless of the nature of their own actions; "[t]he appellees would not be immune from liability as co-conspirators even though the appellees' specific acts in furtherance of the conspiracy could be found to be immune."); *International Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp.*, 189 F.2d 177, 189-90 (9th Cir. 1951) (Taft Hartley Act, 29 U.S.C. § 187(b)), *aff'd on other grounds*, 342 U.S. 237 (1952).

385. 18 U.S.C. § 1962(d) (1994) ("It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.").

386. See, e.g., *Marren*, 890 F.2d at 936 n.3 (finding that § 371 is also applicable to RICO; that unlike § 371, § (d) does not require an overt act; and that consecutive sentences authorized between § 371 and § (d)); *United States v. Neapolitan*, 791 F.2d 489, 497 (7th Cir.) ("[R]ather than creating a new law of conspiracy, RICO created a new objective for traditional conspiracy laws—a violation of sections 1962(a), (b) or (c)."), *cert. denied*, 479 U.S. 939 (1986); *Pepe*, 747 F.2d at 659 ("A RICO conspiracy differs from an ordinary conspiracy in two respects: it need not embrace an overt act, and it is broader and may encompass a greater variety of conduct."); *United States v. Barton*, 647 F.2d 224, 236-38 (2d Cir.) (§ 371 also applicable to RICO; unlike § 371, § (d) does not require an overt act; consecutive sentences authorized between § 371 and § (d)), *cert. denied*, 454 U.S. 857 (1981).

*Elliot*,<sup>387</sup> where the Fifth Circuit explained the rationale of RICO:

In enacting RICO, Congress found that 'organized crime continues to grow' in part 'because the sanctions and remedies available to the government are unnecessarily limited in scope and impact.' Thus, one of the express purposes of the Act was 'to seek the eradication of organized crime. . . by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime' . . . To achieve this result, Congress acted against the backdrop of hornbook conspiracy law. Under the general federal conspiracy statute, the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. . . . In the context of organized crime, this principle inhibited mass prosecutions because a single agreement or 'common objective' cannot be inferred from the commission of highly diverse crimes by apparently unrelated individuals. RICO helps to eliminate this problem by creating a substantive offense which ties together these diverse parties and crimes.<sup>388</sup>

Other circuit courts generally agreed that a RICO conspiracy charge facilitated the prosecution of a diverse pattern of offenses that could not be easily prosecuted in a single proceeding prior to RICO.<sup>389</sup> In *Elliot*, the Fifth Circuit continued:

[T]he object of a RICO conspiracy is to violate a substantive RICO provision . . . and not merely to commit each of the predicate crimes necessary to

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387. 571 F.2d 880 (5th Cir. 1978).

388. *Id.* at 902.

389. See, e.g., *United States v. Carrozza*, 4 F.3d 70, 79 (1st Cir. 1993) ("A RICO conspiracy . . . is considered a single object conspiracy with that object being a violation of RICO . . . . In enacting RICO, Congress intended that 'a series of agreements that under pre-RICO law would constitute multiple conspiracies could under RICO be tried as a single enterprise conspiracy if the defendants have agreed to commit a substantive RICO offense.' ") (citation omitted), *cert. denied*, 114 S. Ct. 1644 (1994); *United States v. Friedman*, 854 F.2d 535, 562-563 (2d Cir. 1988) (finding that

A RICO conspiracy is thus by definition broader than an ordinary conspiracy to commit a discrete crime. . . . So long as the alleged RICO co-conspirators have agreed to participate in the affairs of the same enterprise, the mere fact that they do not conspire directly with each other 'does not convert the single agreement to conduct the affairs of an enterprise through a pattern of racketeering activity into multiple conspiracies.')

(citations omitted), *cert. denied*, 490 U.S. 1004 (1989); *United States v. Valera*, 845 F.2d 923, 930 (11th Cir. 1988) (finding that

Under pre-RICO conspiracy principles, the government may well not have been able to show a single conspiracy under the circumstances of this case, because all conspirators did not agree to any particular predicate crime. Under the RICO Act, however, a series of agreements, which pre-RICO, would constitute multiple conspiracies, can form, under RICO, a single 'enterprise' conspiracy.),

*cert. denied*, 490 U.S. 1046 (1989); *United States v. Rosenthal*, 793 F.2d 1214, 1233, 1334 (11th Cir. 1986) ("Congress intended to authorize the single prosecution of a multi-faceted, diversified conspiracy. . . . The RICO statutes permit the joinder of into a single RICO count or counts several diverse predicate acts, including conspiracies, all which further the goals of the enterprise"), *cert. denied*, 480 U.S. 919 (1987); *United States v. Riccobene*, 709 F.2d 214, 224-25 (3d Cir.) ("[W]e agree with the Fifth Circuit that Congress intended that 'a

demonstrate a pattern of racketeering activity. The gravamen of the conspiracy charge in this case is not that each defendant agreed to commit arson, to steal goods from interstate commerce, to obstruct justice, and to sell narcotics; rather, it is that each agreed to participate, directly and indirectly, in the affairs of the enterprise by committing two or more predicate crimes. Under the statute, it is irrelevant that each defendant participated in the enterprise's affairs through different, even unrelated crimes, so long as we may reasonably infer that each crime was intended to further the enterprise's affairs. To find a single conspiracy, we must still look for agreement on an overall objective. What Congress did was to define that objective through the substantive provisions of the Act.<sup>390</sup>

Unfortunately, *Elliot* was widely misread.<sup>391</sup> In brief, *Elliot* was "[r]ead out of context, without attention to the facts of the case or to the court's rationale."<sup>392</sup> Accordingly, the basic teaching of *Elliot* remains good law, that is, RICO was designed to apply to conspiracies with diverse objectives.<sup>393</sup>

## 2. Elements

The elements of a RICO conspiracy are (1) conduct; (2) surrounding circumstances; and (3) corresponding state of mind.<sup>394</sup> The pre-*Reves* decisions agreed

series of agreements that under pre-RICO law would constitute multiple conspiracies could under RICO be tried as a single "enterprise" conspiracy . . . ." (citing *United States v. Sutherland*, 656 F.2d 1181, 1192 (5th Cir. 1981)), *cert. denied*, 464 U.S. 849 (1983); see generally, Blakey, *supra* note 3, at 297 n.151 ("RICO was designed . . . to facilitate the prosecution of diversified organizations that the traditional conspiracy doctrine, with its narrow focus on a single offense or a single offense and a limited range of cognate or subservient offenses could not easily reach.").

390. 571 F.2d at 902-03.

391. See, e.g., Craig M. Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 37, 877 (1980) ("[The enterprise conspiracy] notion . . . [is] entirely unsupported by the legislative history or the words of the statute, [and] represents a substantial expansion of the already broad preserves of conspiracy doctrine . . ."); Barry Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 65, 251-52 (1980) ("The primary flaw in the *Elliot* view is the court's assumption that the scope of a RICO substantive offense or a RICO conspiracy is defined by the enterprise.").

392. *Sutherland*, 656 F.2d at 1192. The *Elliot* court's analysis of enterprise conspiracy was written in the context of an *illicit* enterprise. The commentators failed to see that the application of the enterprise conspiracy concept would be different if the enterprise was *licit*. That point of confusion was cleared up in *Sutherland*, 656 F.2d at 1189-95, which involved a traffic court and a corrupt judge and two others who fixed tickets, neither of whom was aware of the other. The Fifth Circuit held that an enterprise conspiracy was not shown, even though each participated in same enterprise, the traffic court:

*Elliot* does indeed hold that *on the fact of that case* a series of agreements that under pre-RICO law would constitute multiple conspiracies could under RICO be tried as a single 'enterprise' conspiracy . . . . [But] *Elliot* does not stand for the proposition that multiple conspiracies may [always] be tried on a single 'enterprise conspiracy' count under RICO *merely* because the various conspiracies involve the same enterprise.

*Id.* at 1192, 1194 (emphasis added).

393. See, e.g., *Pepe*, 747 F.2d at 659 n.43 (discussing "broad range" of RICO prosecutions).

394. See Ickler, *supra* note 3, at 590 (discussing elements of RICO conspiracy).

that the conduct and state of mind necessary to violate § 1962(d) were an *agreement*, intentionally entered into with knowledge of the relevant liability circumstances of a substantive RICO provision, that is, § 1962, (a), (b), or (c).<sup>395</sup> Accordingly, the objective of a RICO conspiracy is defined by the elements of RICO itself.<sup>396</sup> Similarly, the state of mind requirement for a RICO conspiracy took its contours from the elements of RICO.<sup>397</sup>

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395. See, e.g., *United States v. Malatesta*, 590 F.2d 1379, 1381 (5th Cir.) (state of mind for conspiracy equal to the substantive offense; "[T]o be convicted of an unlawful [RICO] conspiracy a defendant must have knowledge of the conspiracy and must intend to join, or associate himself with the objectives of, the conspiracy."), *cert. denied*, 440 U.S. 962 (1979).

396. See, e.g., *Schiffels*, 978 F.2d at 348 ("RICO conspiracy is governed by traditional concepts of conspiracy law . . . . Section 1962(d)'s target, like that of all provisions prohibiting conspiracies, is the agreement to violate RICO's substantive provisions, not the actual violations themselves."); *Tille*, 729 F.2d at 619 ("RICO . . . makes it unlawful for a person 'to conspire to violate any of the provisions of subsections (a), (b), (c) of [§ 1962].' "); *Elliott*, 571 F.2d at 902 (stating elements necessary to violate § 1962(d) through § 1962(c); "the object of a RICO conspiracy is to violate a substantive RICO provision here, [§ 1962(c)] to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity and not merely to commit each of the predicate crimes necessary to demonstrate a pattern of racketeering activity."); *Riccobene*, 709 F.2d at 220-21, 224 (stating that

RICO [under § 1962(c)] makes it a federal crime for individuals 'employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.'

Section 1962(d) provides that it is unlawful to conspire to violate Section 1962(c)).

397. *Pre-Reves*, the state of mind for the surrounding circumstances that play a liability role in § 1962(a), (b), or (c) was *knowledge*. See, e.g., *United States v. Campione*, 942 F.2d 429, 437 (7th Cir. 1991) ("The Government need only prove that the defendant entered into an agreement with knowledge that the goal of the conspiracy is the commission of the RICO violation . . . ") (quoting *United States v. O'Malley*, 796 F.2d 891, 896 n.5 (7th Cir. 1986)); *United States v. Morrow*, 914 F.2d 608, 612 (4th Cir. 1990) ("knowledge of the essential nature of the plan"); *United States v. Leisure*, 844 F.2d 1347, 1367 (8th Cir.) ("agreed to join the . . . enterprise with the knowledge that other members of the enterprise would commit . . . ."), *cert. denied*, 488 U.S. 932 (1988); *United States v. Joseph*, 835 F.2d 1149, 1152 (6th Cir. 1987) ("knowledge of the 'essential nature of the plan.' ") (quoting *United States v. Brasseaux*, 509 F.2d 157, 160 n.3 (5th Cir. 1975)); *United States v. Teitler*, 802 F.2d 606, 612 (2d Cir. 1986) ("knowing the object of the conspiracy, [the defendant] agreed to join with others to achieve those objects"); *United States v. Brooklier*, 685 F.2d 1208, 1222 (9th Cir. 1982) ("[I]t is a crime to conspire to commit the substantive RICO offense . . . . The overall conspiracy requires the assent of each defendant who is charged, although it is not necessary that each conspirator knows all of the details of the plan or conspiracy.") (citing *Elliott*, 571 F.2d at 900-05), *cert. denied*, 459 U.S. 1206 (1983); *United States v. Winter*, 663 F.2d 1120, 1136 (1st Cir. 1981) ("knowingly join an enterprise and agree to"), *cert. denied*, 460 U.S. 1011 (1983); *Martino*, 648 F.2d at 394 ("To convict on a charge of conspiracy, the government must prove that the defendant had knowledge of the conspiracy and that he intended to join in the objectives of the conspiracy. The degree of criminal intent necessary for participation in a conspiracy must be at least equal to that required for the substantive offense.") (citation omitted). *But see Blinder*, 10 F.3d at 1477 (finding that

The RICO statute does not discuss *mens rea* . . . [The defendant] offers no case law that supports his view that *mens rea* must be explicitly stated in the RICO [conspiracy] instructions . . . [T]he Second Circuit has held that 'RICO' imposes no additional *mens rea* beyond that found in the predicate crimes . . . . [W]e note that the jury was properly instructed covering the *mens rea* element of each predicate act charged);

*United States v. Cardall*, 885 F.2d 656, 679 (10th Cir. 1989) (requiring knowledge); *Perholtz*, 842 F.2d at 354 ("[T]he government must prove . . . that the defendant knowingly participated, even indirectly in the conduct of the enterprise through a pattern of racketeering."); *Pepe*, 747 F.2d at 659-60 ("The Government need only prove

Under the pre-*Reves* decisions, once a person was found to be a knowing member of a RICO conspiracy, his knowledge of its dimension in parties and objectives beyond his immediate participation was not in question; rather, his

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that each defendant conspired to commit the substantive RICO offense and was aware that others had done likewise.”) (citing *Sutherland*, 656 F.2d at 1193-94 and *Elliot*, 571 F.2d at 903).

The pre-*Reves* decisions did not routinely raise the issue of “willfull blindness.” *But see* Fed. Deposit Ins. Corp. v. Antinio, 843 F.2d 1311, 1314 (10th Cir. 1988) (willfull blindness sufficient for state RICO prosecution). Post-*Reves II* decisions recognize the applicability of the doctrine in a RICO context. *See, e.g.*, *United States v. Hurley*, 63 F.3d 1, 9-10 (1st Cir. 1995) (“willful blindness” instruction given on state of mind for money laundering; instruction did not dilute state of mind for RICO conspiracy); *United States v. Aulicino*, 44 F.3d 1102, 1115 (2d Cir. 1995) (upholding “conscious avoidance” instruction; “[w]here there is sufficient evidence that the defendant was a member of a conspiracy, a conscious-avoidance instruction may properly be given, permitting the jury to convict if it finds that the defendant deliberately attempted to remain ignorant of the conspiracy’s precise goals”).

The status of willful blindness, however, is hardly settled. The classic general piece is Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191 (1990); *see also* Jonathan L. Marcus, *Model Penal Code Section 2.02 ( ) and Willful Blindness*, 102 YALE L.J. 2231 (1993). Where knowledge of an element of an offense is required, “such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.” *Turner v. United States*, 396 U.S. 398, 416 n.29 (1970). Nevertheless, no one is “entitled” to “practice studied ignorance.” *Id.* at 417 (citing with approval *Griego v. United States*, 298 F.2d 845, 849 (10th Cir. 1962) (citing *Spurr v. United States*, 174 U.S. 728, 735 (1899) (bank fraud; “evil design” may be inferred if one “purposefully keeps himself in ignorance” or is “grossly indifferent to his duty in the ascertainment of [the] fact”))); *see also* *United States v. Glick*, 710 F.2d 639, 642 (10th Cir. 1983) (willful ignorance sufficient for responsibility in fraudulent scheme; “either knew it or deliberately avoided acquiring positive knowledge”), *cert. denied*, 465 U.S. 1005 (1984); *United States v. Nicholson*, 677 F.2d 706, 710-11 (9th Cir. 1982) (conscious avoidance instruction proper for cash investor with high return in “business” that was drug conspiracy; “defendant was aware of a high probability that his money would be used to further illegal activities and . . . he deliberately avoided finding out the facts.”). The courts of appeals, however, are split in determining the weight to be given evidence of willful blindness. The majority hold that either knowledge or deliberate avoidance must be shown. *Second Circuit*: *United States v. Aulet*, 618 F.2d 182, 190-191 (2d Cir. 1980); *United States v. Dozier*, 522 F.2d 224, 226-27 (2d Cir.), *cert. denied*, 423 U.S. 1021 (1975); *Third Circuit*: *United States v. Gen. Motors Corp.*, 226 F.2d 745, 749 (3d Cir. 1955); *United States v. Erie R. Co.*, 222 F. 444, 450 (D.N.J. 1915); *Fifth Circuit*: *United States v. Restrepo-Granda*, 575 F.2d 524, 528-29 (5th Cir.), *cert. denied*, 439 U.S. 935 (1978); *Sixth Circuit*: *United States v. Thomas*, 484 F.2d 909, 912-14 (6th Cir.), *cert. denied*, 414 U.S. 912 (1973); *Ninth Circuit*: *United States v. Eaglin*, 571 F.2d 1069, 1074-75 (9th Cir. 1977), *cert. denied*, 435 U.S. 906 (1978); *United States v. Murrieta-Bejarano*, 552 F.2d 1323, 1324-25 (9th Cir. 1977); *Jewell*, 532 F.2d at 700-04; *Tenth Circuit*: *Glick*, 710 F.2d at 639; *Eleventh Circuit*: *United States v. Gold*, 743 F.2d 800, 821-22 (11th Cir. 1984), *cert. denied*, 469 U.S. 1217 (1985). *But see* *United States v. Knight*, 705 F.2d 432, 434 (11th Cir. 1983) (although citing Ninth Circuit cases as general support, stating that knowledge “can only be inferred by referring to that defendant’s subjective views of what was obvious to him had he not closed his eyes.”). A minority holds that willful blindness is merely circumstantial evidence of knowledge. *Fourth Circuit*: *United States v. Biggs*, 761 F.2d 184, 188 (4th Cir. 1985); *Eighth Circuit*: *United States v. Massa*, 740 F.2d 629, 642-43 (8th Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985); *United States v. Graham*, 739 F.2d 351, 352-53 (8th Cir. 1984); *United States v. Kershman*, 555 F.2d 198, 200-01 (8th Cir.), *cert. denied*, 434 U.S. 892 (1977). Each of the Eighth Circuit decisions holding that it is merely circumstantial, however, cites as persuasive authority cases following the majority rule. Apparently, the court does not believe the distinction between the minority and majority rules is of great substance; *District of Columbia Circuit*: *United States v. Gallo*, 543 F.2d 361, 367 (D.C. Cir. 1976) (evidence of willful ignorance may be considered as part of proof of requisite knowledge); *see also* *Royal Netherlands S.S. Co. v. Federal Maritime Bd.*, 304 F.2d 938, 942 (D.C. Cir. 1962) (evidence insufficient to warrant finding that defendant willfully avoided discovery of facts). The *First Circuit* takes both sides of the issue. *Compare* *United States v. Cincotta*, 689 F.2d 238, 243 n.2 (1st Cir.) (“Evidence of conscious avoidance is merely circumstantial evidence of knowledge . . .”), *cert. denied*, 459 U.S. 991 (1982)

recklessness was at issue.<sup>398</sup> Thus, it was only necessary that he know the "essential nature of the plan."<sup>399</sup> If the person agreed to engage in a "pattern of racketeering activity," but was not aware of the other RICO-related liability

with *United States v. Brien*, 617 F.2d 299, 312 (1st Cir.), ("[C]onscious avoidance is merely a subset of specific intent. . . . If, by such conduct one participates in a scheme to defraud, that person is as guilty of violating the mail fraud statutes as a person who is conscious of the nature of his statements."), *cert. denied*, 446 U.S. 919 (1980); *see also*, *United States v. Krown*, 809 F.2d 144, 150 (1st Cir. 1987) ("proving knowledge by means of willful blindness").

When a statute requires "knowledge," giving a willful blindness instruction, however, risks a jury's substituting "negligence" or "recklessness" for "knowledge." *Compare*, *United States v. Adamson*, 700 F.2d 953, 956 (5th Cir. 1983) (danger of substitution of negligence for knowledge warrants reversal), with *United States v. Camuti*, 78 F.3d 738, 744 (1st Cir. 1996) (willful blindness instruction not plain error when the single careless excluded). The instruction is hard to square with the Supreme Court's most recent teaching on state of mind. *See generally*, APPENDIX D (STATE OF MIND). If squarely faced with the issue anew, the Court would most likely adopt the reasoning of then Judge Kennedy in dissent in *United States v. Lewell*, 532 F.2d 697, 705-06 (9th Cir. 1976) ("When a statute specifically requires knowledge as an element of a crime. . . the substitution of some other state of mind cannot be justified even if the court deems that both are equally blame worthy"). Indeed, Congress knows well how to impose a willful blindness standard itself. *See, e.g.*, *United States v. One 1973 Rolls Royce*, 113 F.3d 794, 799 (3d Cir. 1994) (21 U.S.C. § 881(a)(4)(c)). Even so, a proper willful blindness instruction ought always expressly include language requiring a high probability of subjective awareness of the fact in issue deliberate, affirmative conduct to avoid knowledge of this fact and an express excusion of a person who in fact believes that the fact does not exist. *Id.* at 888; *Accord* *United States v. Kahn*, 53 F.3d 507, 516-17 (2d Cir. 1995) (RICO; willful blindness instruction not plain error, even though it did not include "actual belief" language since it excluded "careless, negligent or foolish conduct").

398. *See Elliott*, 571 F.2d at 904 ("When a person 'embarks upon a criminal venture of indefinite outline, he takes his chances as to its content and membership, so be it that they fall within the common purposes as he understands them.' ") (quoting *United States v. Andolschek*, 142 F.2d 503, 507 (2d Cir. 1944) (Hand, J.)).

399. *Id.* at 904 (quoting *Blumenthal*, 332 U.S. at 556-57). *But see Blumenthal*, 332 U.S. at 558 ("knew or must have known that others unknown to them were sharing in so large a project") (emphasis added). *Elliott* states the general rule. *See, e.g.*, *United States v. Rastelli*, 870 F.2d 822, 828 (2d Cir.) (when

[f]ocusing on a RICO conspiracy, the government need not prove that a conspirator-defendant agreed with every other conspirator, or knew all the other conspirators, or had full knowledge of all the details of the conspiracy . . . . [I]t is sufficient that he know the general nature of the conspiracy and that the conspiracy extends beyond his individual role.)

(citation omitted), *cert. denied*, 493 U.S. 982 (1989); *Joseph*, 835 F.2d at 1152 ("The government was not required to prove that [the defendant] had knowledge of every detail of a plan; it is sufficient that he had knowledge of the 'essential nature of the plan.' ") (quoting *Elliott*, 571 F.2d at 503); *United States v. De Peri*, 778 F.2d 963, 975 (3d Cir. 1985) ("[I]t is well established that one conspirator need not know the identities of all his coconspirators, nor be aware of all the details of the conspiracy in order to be found to have agreed to participate in it.' The government proved that the defendants understood the essential nature of the plan and knowingly agreed to participate in the plan, which is sufficient for RICO liability.") (quoting *Riccobene*, 709 F.2d at 225), *cert. denied*, 475 U.S. 1110 (1986); *Schell*, 775 F.2d at 569 ("To sustain his RICO conviction, it is sufficient that he knew the existence of the enterprise and that the scope of the enterprise extended beyond his individual role . . . ") (citing *Elliott*, 571 F.2d at 901), *cert. denied*, 475 U.S. 1098 (1986); *United States v. Cagnina*, 697 F.2d 915, 922 (11th Cir.) ("The evidence . . . [need] not show that every member of the enterprise participated in or knew about all its activity") (citing *Elliott*, 571 F.2d at 903-04), *cert. denied*, 464 U.S. 896 (1983); *Brooklier*, 685 F.2d at 1222 ("not necessary that each conspirator knows all of the details of the plan or conspiracy") (citing *Elliott* 571 F.2d at 900-05); *United States v. Tashjian*, 660 F.2d 829, 834 (1st Cir.) ("The breadth of the alleged conspiracy does not in itself evidence an impermissible prosecutorial objective, but rather simply reflects the fact that RICO enables the Government to cast a wider net than was possible under traditional conspiracy principles.") (citing *Elliott*, 571 F.2d at 902-03), *cert. denied*, 454 U.S. 1102 (1981); *United States v. Lee Stoller Enters.*, 652 F.2d 1313, 1319 (7th Cir.) (en banc) ("[T]he specific purpose of the substantive provisions of RICO is to tie

elements, that is, "enterprise," other participants in other "racketeering activity," etc., he could not be held responsible for RICO.<sup>400</sup> State of mind was required, however, only on the liability elements. It did not extend to the jurisdictional elements, or, the requisite effect on commerce;<sup>401</sup> nor did it extend to legal elements, or, the criminality of the activity itself.<sup>402</sup>

### 3. *Plurality and Intracorporate Conspiracy*

The pre-*Reves* circuit court decisions were split in finding the necessary plurality when multiple agents of a corporation act along with the corporation for which they work. Where two or more agents of the corporation agree, the conduct element of conspiracy is fulfilled. Accordingly, the intracorporate conspiracy doctrine should not preclude RICO criminal or civil responsibility in such cases. The decisions, however, diverged. The rationale for the intracorporate conspiracy doctrine is that while a corporation is recognized as a legal person, it cannot agree except through its agents; thus, when only a single agent is involved, the conduct requirement of agreement is not met. Accordingly, when only a single agent is involved, no danger from collective action exists, but where multiple agents act, the conspiracy doctrine should be applicable.<sup>403</sup> The circuit courts did not deal

together diverse parties and crimes. Under RICO, it is irrelevant that each defendant participated in the enterprise's affairs through different and unrelated crimes.") (citing *Elliott*, 571 F.2d at 902), *cert. denied*, 454 U.S. 1082 (1981). A corollary of the *Andolschek* rule, of course, is that "one who embarks on a criminal venture with a circumscribed outline is not responsible for acts of his coconspirator which are beyond the goals as the defendant understands them." *Bright*, 630 F.2d at 835 n.32 (RICO prosecution).

400. See, e.g., *Diecidue*, 603 F.2d at 556 (reversing RICO conviction; no knowledge shown of roles of other participants in murder and drugs); *Elliott*, 571 F.2d at 906-07 (reversing RICO conviction; no knowledge shown of roles of other participants in wide range of criminal conduct).

401. *Stern*, 858 F.2d at 1245.

402. *Marren*, 890 F.2d at 932-33 (RICO conspiracy that included objective to evade income tax liability; state of mind for tax aspect limited to tax due and owing, not its criminality) (citing *Ingram*, 360 U.S. at 678).

403. After careful analysis of the policy considerations, the Seventh Circuit held in *Ashland Oil v. Arnett*, 875 F.2d 1271 (7th Cir. 1989), that the Supreme Court's decision in *Copperweld Corp.*, 467 U.S. at 774-75 (a parent cannot conspire with subsidiary to violate the antitrust laws), was not applicable to RICO. *Ashland Oil*, 875 F.2d at 1281.

Since a subsidiary and its parent theoretically have a community of interest, a conspiracy 'in restraint of trade' between them poses no threat to the goals of antitrust law—protecting competition. In contrast, intracorporate conspiracies do threaten RICO's goals of preventing the infiltration of legitimate businesses by racketeers and separating racketeers from their profits.

*Id.* (citations omitted). *Accord*, *Shearin v. E.F. Hutton Group*, 885 F.2d 1162, 1167 (3d Cir. 1989) (parent may conspire with subsidiary; no detailed analysis of question); *Haroco v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 403 n.22 (7th Cir. 1984) (distinguishing intracorporate conspiracy doctrine under antitrust and RICO;

In *Copperweld* the court held that a parent corporation and a wholly owned subsidiary are incapable of conspiring with one another for purposes of [§ 1] of the Sherman Act 15 U.S.C. § 1. That holding does not extend to RICO's provisions in 18 U.S.C. § 1962(c) primarily because the Sherman Act is premised, as RICO is not, on the 'basic distinction between concerted and independent action.' . . . The policy considerations discussed in *Copperweld* . . . therefore do not apply to RICO, which is targeted primarily at the profits from patterns of racketeering activity.),



with the intracorporate conspiracy doctrine under RICO when only a single agent and a corporation were involved, but the district courts split on this issue, principally in the context of civil litigation. Most district court decisions rejected liability,<sup>404</sup> but several courts inexplicably extended RICO conspiracy liability to single agent-corporation conspiracies.<sup>405</sup>

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*aff'd*, 473 U.S. 606 (1985). Without a careful analysis of the policy considerations, however, the Sixth and Fourth Circuits have followed a contrary approach. *New Beckley Mining v. International Union, United Mine Workers*, 18 F.3d 1161, 1164 (4th Cir. 1994) (intracorporate conspiracy doctrine precludes a RICO conspiracy between a labor union and its members;

As we explained in *Computer Sciences*, 'we would not, take seriously, in the absence, at least, of very explicit statutory language, an assertion that a defendant could conspire with his right arm, which held, aimed and fired the fatal weapon. . . . Inasmuch as the complaint alleged that the International, 'its officers, directors, employees, agents, subagents, and any other person or entity acting on the counsel, command, induction, procurement, instigation or direction of the International' conspired with the districts and locals, the conspiracy counts cannot stand.)

(citing *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983)); *Palmer v. Nationwide Mut. Ins. Co.*, 945 F.2d 1371, 1376 (6th Cir. 1991) (not recognizing conspiracy between multiple agents and a corporation; "Ordinarily, officers and directors of corporations are not deemed at law to be conspirators with the employing entity.").

404. *See, e.g., Nebraska Sec. Bank v. Dain Bosworth*, 838 F. Supp. 1362, 1370-72 (D. Neb. 1993) (no civil RICO conspiracy where a single agent, in the scope of his employment, conspires with a corporation, or a corporation conspires with its wholly-owned subsidiary); *Colonial Penn Ins. Co. v. Value Rent-A-Car*, 814 F. Supp. 1084, 1096-97 (S.D. Fla. 1992) (stating

It is basic in the law of conspiracy that you must have at least two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation. . . . While conducting company business, an officer or representative of a corporation cannot conspire with the corporation of which he forms an indispensable part);

*Yancoski v. E. F. Hutton & Co.*, 581 F. Supp. 88, 97 (E.D. Pa. 1983) ("[A] corporation and its employee do not constitute the 'two or more persons' required for a civil conspiracy.") (citation omitted).

405. *See, e.g., Saine*, 582 F. Supp. at 1307 n.9 (permitting single agent-corporation conspiracy liability;

[Defendant] argues that the conspiracy claim must be dismissed because a corporation cannot conspire with one of its agents, for a conspiracy cannot exist among a 'single person.' This argument is premised upon the fiction of corporate entity, which can in appropriate circumstances be pierced. As RICO should be concerned with the problem of intracorporate conspiracies, this is an appropriate case for disregarding the fiction);

*Mauriber v. Shearson/Am. Express*, 567 F. Supp. 1231, 1241 (S.D.N.Y. 1983) (allowing single actor-corporation conspiracy liability;

Defendant argues that the conspiracy claim under section 1962(d) must be dismissed because a corporation cannot conspire with one of its agents—for a conspiracy cannot exist amongst a 'single person.' . . . The Third Circuit has rejected defendant's 'single person' theory in the context of civil actions under 42 U.S.C. § 1985 . . . [W]here the 'action by an incorporated collection of individuals creates the 'group danger' at which conspiracy liability is aimed, . . . the view of the corporation as a single legal actor becomes a fiction without a purpose. . . . I do not believe that RICO should be construed as being unconcerned with intracorporate conspiracies. Accordingly, defendant's motion to strike this portion of the complaint is denied.)

(citations omitted).

#### 4. *Personal Act*

The pre-*Reves* circuit court decisions were split on the issue of whether a RICO enterprise conspiracy requires that the defendant agree *personally* to engage in a pattern of racketeering activity or merely that such pattern be committed by another. The best discussion of the two personal act rule is found in the Seventh Circuit's decision in *United States v. Neapolitan*,<sup>406</sup> where the court aptly stated: "[n]othing on the face of the statute or its legislative history supports the imposition of a more stringent level of personal involvement in a conspiracy to violate RICO as opposed to a conspiracy to violate anything else."<sup>407</sup> The source of the two personal act rule may be traced to a misunderstanding of language in *United States v. Elliott*,<sup>408</sup> where the Fifth Circuit observed: "[t]o be convicted as a member of an enterprise conspiracy, an individual, by his words or actions, must have objectively manifested an agreement to participate, directly or indirectly, in the affairs of an enterprise through the commission of two or more predicate crimes."<sup>409</sup> The Fifth Circuit's observation in *Elliott* was ambiguous: did it mean that the individual agreed *personally* to commit two or more offenses or that he agreed that *someone* in the enterprise would commit the two or more offenses?<sup>410</sup> Initially, the Fifth Circuit used the language in *Elliott* as a rule of evidence, not a rule of liability; thus, where a defendant actually committed two acts, the court was willing to uphold a verdict that he was a member of an enterprise conspiracy.<sup>411</sup>

Nonetheless, in *United States v. Martino*,<sup>412</sup> the Fifth Circuit restated RICO's statutory elements as: (1) the existence of the enterprise; (2) the enterprise's effect on commerce; (3) the association of the defendant with the enterprise; (4) the defendant's participation in the conduct of the affairs of the enterprise; and (5) the defendant's participation in the enterprise through a pattern of racketeering activity. The *Martino* court, citing *Elliott*, commented that a RICO conspiracy was formed by an agreement "to participate in the conduct of the affairs of the enterprise through the commission of two or more predicate crimes."<sup>413</sup> The court then proceeded to apply the *Elliott* rule of evidence as if it were a rule of liability, finding that because the government did not prove that the individual defendants committed two or more predicate offenses, they were not guilty of a RICO conspiracy or of RICO itself.<sup>414</sup>

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406. 791 F.2d 489 (7th Cir.), *cert. denied*, 479 U.S. 939 (1986).

407. *Id.* at 498; *see also Local 560*, 581 F. Supp. at 330-32 (rejecting two personal act rule).

408. 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978).

409. *Id.* at 903.

410. *See, e.g., Lemm*, 680 F.2d at 1203 n.11 (discussing ambiguity in RICO); *Winter*, 663 F.2d at 1136 (same).

411. *Elliott*, 571 F.2d at 903 ("Where . . . the evidence establishes that each defendant . . . committed several acts of racketeering activity in furtherance of the enterprise's affairs, the inference of an agreement . . . is unmistakable.").

412. 648 F.2d at 394.

413. *Id.*

414. *Id.* at 396. "One who does not agree to do that vital element—participate in the enterprise through the

These holdings in the Fifth Circuit led the First and Second Circuits to require, as a rule of liability, that a defendant agree to commit *personally* two specified predicate crimes.<sup>415</sup> The Third, Fourth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits, however, held that to violate RICO, a defendant need not agree to commit personally the predicate acts himself, but only need agree to their commission by another member of the conspiracy.<sup>416</sup> The position of the Tenth Circuit was

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commission of at least two predicate acts—cannot be convicted on a RICO conspiracy charge.” *Id.* The court also observed: “[t]he evidence establishes that [the defendant] committed only one predicate act. . . . A RICO conspiracy conviction requires that . . . two predicate crimes [be] agreed to.” *Id.* at 400. *Accord* United States v. Phillips, 664 F.2d 971, 1011-12, 1039 (5th Cir. 1981) (two predicate crimes necessary for RICO conviction), *cert. denied*, 457 U.S. 1136 (1982); *Sutherland*, 656 F.2d at 1189 (same); *Welch*, 656 F.2d at 1057 (same); United States v. Peacock, 654 F.2d 339, 341 (5th Cir. 1981) (same), *cert. denied*, 464 U.S. 965 (1983).

415. See *United States v. Ruggiero*, 726 F.2d 913, 921 (2d Cir.) (reversing RICO conspiracy conviction where the defendant only agreed to commit personally one predicate act;

The government argues that no predicate acts are necessary for a RICO conspiracy charge against [defendant], and that it is sufficient that [defendant] was found to have conspired with others to engage through an enterprise in a pattern of racketeering consisting of predicate acts committed by others. We are reluctant to accept this extremely broad interpretation of RICO in the absence of controlling authority. Prevailing case law requires that for the government to convict on a RICO conspiracy it must prove that defendant himself at least agreed to commit two or more predicate crimes.),

*cert. denied*, 469 U.S. 831 (1984); *Winter*, 663 F.2d at 1136 (defendant must agree to personally commit two predicate crimes; “We hold . . . that a RICO conspiracy count must charge as a minimum that each defendant agreed to commit two or more specified predicate crimes in addition to charging an agreement to participate in the conduct of an ‘enterprise’s’ affairs through a ‘pattern of racketeering activity.’ ”).

416. See *Pryba*, 900 F.2d at 760 (stating that

The heart of a conspiracy is the agreement to do something that the law forbids. There is no requirement that each conspirator personally commit illegal acts in furtherance of the conspiracy or to accomplish its objectives. To adopt appellants’ position would add an element to RICO conspiracy that Congress did not direct, and this would be contrary to the majority of circuits which have decided the issue.);

*Stern*, 858 F.2d at 1246-47 (“[A] ‘defendant need only agree that he and his co-conspirators will operate an enterprise through the commission of two predicate acts.’ The RICO conspiracy provision does not require that a defendant agree personally to commit two acts of racketeering activity; *United States v. Kragness*, 830 F.2d 842, 859-60 (8th Cir. 1987) (stating that

There is a split of authority among the circuits as to whether a § 1962(d) conspiracy to violate § 1962(c) requires that one agree personally to commit at least two predicate crimes, a view espoused by two circuits [First and Second Circuits], or whether it is instead sufficient . . . to agree to the commission of two or more predicate crimes by coconspirators. . . . [W]e agree with the majority of the other circuits that RICO conspiracy law, like traditional conspiracy law, requires only that each defendant agree to join the conspiracy, not that he agree to commit each of the acts that would achieve the conspiracy’s object. The terms Congress employed in the statute are expansive; it speaks not just of ‘conduct[ing],’ but also of ‘participat[ing],’ directly or indirectly, in the conduct . . . through a pattern of racketeering activity.’ As other circuits have observed, the statute does not explicitly require an agreement personally to commit predicate acts, and such a narrow construction would not square with the congressional purpose in RICO of broadening the remedies available to combat organized crime);

*United States v. Joseph*, 781 F.2d 549, 554 (6th Cir. 1986) (“For a [RICO] conspiracy conviction it is not necessary to prove that the defendant agreed to personally commit the requisite acts, but only that he agreed that

unclear.<sup>417</sup> Commentators rejected the rule, arguing that it was perverse because a “mob boss” who is “intimately involved in the conspiracy, [but who] neither agreed to personally commit nor actually participated in the commission of the predicate crimes” would elude prosecution.<sup>418</sup> They argued that that result could not be what Congress intended.<sup>419</sup>

### 5. *Overt Act*

The circuit courts were also split on whether an overt act is required in criminal RICO prosecutions. The leading decision holding that § 1962(d) did not require an overt act for criminal liability was *United States v. Barton*,<sup>420</sup> where the Second Circuit held:

While the general conspiracy statute requires proof of an overt act, the RICO

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another violate § 1962(c) by committing two acts of racketeering activity.”); *United States v. Adams*, 759 F.2d 1099, 1116 (3d Cir.) (“We now decide that to be convicted of a RICO conspiracy, a defendant must agree only to the commission of the predicate acts, and need not agree to commit personally those acts.”), *cert. denied*, 474 U.S. 906 (1985); *Tille*, 729 F.2d at 619 (stating that

RICO makes it unlawful, among other things, for a person associated with an enterprise engaged in interstate commerce to ‘participate . . . in the conduct of such enterprise’s affairs through a pattern of racketeering activity.’ . . . The issue presented is whether § 1962(d) of RICO requires proof that a defendant agreed to commit personally two predicate offenses. Several circuits have held or assumed that a defendant’s personal participation, by act or agreement, in the predicate offenses is required. . . . The statutory language, however, does not require proof that a defendant participated personally, or agreed to participate personally, in two predicate offenses. Read in context, § 1962(d) makes it unlawful to conspire to conduct or participate in the conduct of an enterprise’s affairs, where its affairs are conducted through a pattern of racketeering activity.)

(citations omitted); *Carter*, 721 F.2d at 1528-31 (stating that

When . . . a defendant agreed to participate in the conduct of an enterprise’s affairs with the objective of violating a substantive RICO provision, it is not necessary that the defendant agree to personally commit two predicate acts for the required pattern of racketeering activity. It is enough that the defendant agreed to the commission of two predicate acts.)

417. Compare *United States v. Killip*, 819 F.2d 1542, 1548 (10th Cir.) (refusing to consider issue directly because it was not specifically before it), *cert. denied*, 484 U.S. 865 (1987), with *United States v. Sanders*, 929 F.2d 1466, 1473 (10th Cir.) (“[F]or purposes of this appeal we adopt the rule of law that the defendant must agree to personally commit two predicate acts, not merely agree to the commission of two predicate offenses by any conspirator.”), *cert. denied*, 502 U.S. 846 (1991).

418. *Neopolitan*, 791 F.2d at 496-98; see also Blakey, *supra* note 3, at 297-98 n.151 (stating that

[U]nder the two personal act rule anyone who keeps his hand clean—merely directs others—will not be criminally responsible either for conspiracy, or for violating RICO itself. [The prosecution of mob bosses Charles Luciano or Vito Genovese] would be difficult, if not impossible . . . [to bring] under RICO. . . ., [a] result . . . hardly consistent with Congressional intent, for an analysis of both prosecutions played a key role in the early stages of the thinking that led to RICO.)

(citations omitted).

419. The impact of the two personal act rule, however, is mitigated by holdings in the Second and Fifth Circuits that it is satisfied by a defendant’s agreement to aid and abet the commission of predicate acts committed by other defendants. *Rastelli*, 870 F.2d at 831-32; *Cauble*, 706 F.2d at 1339.

420. 647 F.2d at 237.

conspiracy section does not. . . . The RICO conspiracy statute, like the special statute considered in *Singer*, does not mention such an element, and the report of the Senate Judiciary Committee with respect to § 1962(d) made express reference to the *Singer* case.<sup>421</sup>

*Barton* reflected the general rule.<sup>422</sup> While other circuit court decisions required an overt act, they were singularly free of reasoning and cited inapposite precedent.<sup>423</sup> Distressingly, circuit courts that had squarely held that no overt act was required changed their view and held that such an act was required—without acknowledging their prior decisions. Strangely, these courts cited inapposite decisions or thoughtlessly relied on standard conspiracy instructions that required an overt act.<sup>424</sup> The circuit courts were, however, uniform in requiring more than an agreement for civil liability, even though they did not require an overt act for criminal responsibility.<sup>425</sup>

## 6. Standing

The issue of “standing” to sue civilly under § 1964(c) for a violation of § 1962(d) was the subject of conflicting decisions in the circuit courts. The

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421. *Id.* at 237 (citing S. REP. NO. 91-617 at 159 (1969) and *Singer v. United States*, 323 U.S. 338, 340-42 (1945)).

422. See, e.g., *Marren*, 890 F.2d at 936 n.3 (following *Barton*); *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1132 (3d Cir. 1988) (same); *Angiulo*, 847 F.2d at 964 (following *Barton*; “[s]ince § 1962(d) does not, itself, require overt acts, there is no reason for us to imply such a requirement.”); *United States v. Tripp*, 782 F.2d 38, 41 (6th Cir.) (requiring no overt act), *cert. denied*, 475 U.S. 1128 (1986); *United States v. Coia*, 719 F.2d 1120, 1124 (11th Cir. 1983) (following *Barton*; “eminently reasonable and consistent with . . . [*Singer*].”), *cert. denied*, 466 U.S. 973 (1984). See also, *United States v. Shabani*, 115 S.Ct. 382, 383-86 (1994) (21 U.S.C. § 846; absent contrary indications Congress presumed to follow common law rule that did not require overt act in conspiracy).

423. See, e.g., *Yarbough*, 852 F.2d at 1541 (affirming RICO conviction; giving standard conspiracy instruction requiring an overt act); *Schell*, 775 F.2d at 568 (“require[ment] to show the existence of an enterprise and an overt act”) (citing *Turkette*, 452 U.S. at 583); *Sutherland*, 656 F.2d at 1187 n.4 (government need only show one co-conspirator committed one overt act in furtherance of conspiracy) (citing *United States v. Fuiman*, 546 F.2d 1155, 1158 (5th Cir.), *cert. denied*, 434 U.S. 856 (1977)).

424. See, e.g., *United States v. Ford*, 21 F.3d 759, 761 (7th Cir. 1994) (“[T]o prove the existence of a [RICO] conspiracy, the government must establish that . . . the defendants performed at least one overt act. . . .”) (citing *United States v. Scarbrough*, 990 F.2d 296, 299 (7th Cir.) (non-RICO conspiracy statute), *cert. denied*, 114 S. Ct. 121 (1993)); *United States v. Caporale*, 806 F.2d 1487, 1515-16 (11th Cir. 1986) (affirming RICO conspiracy conviction; giving standard conspiracy instruction requiring overt act), *cert. denied*, 483 U.S. 1021 (1987).

425. See, e.g., *Abou-Khadra v. Mahshie*, 4 F.3d 1071, 1080 n.8 (2d Cir. 1993) (stating that

[B]ecause a conspiracy—an agreement to commit predicate acts—cannot by itself cause any injury, we think that Congress presupposed injury-causing overt acts as the basis of civil standing to recover for RICO conspiracy violations . . . although an overt act by itself (whether or not injury ensues) is not a requisite element of a section 1962(d) criminal conspiracy violation . . . .)

(quoting *Hecht*, 897 F.2d at 25 (requiring overt act that constitutes racketeering activity for civil responsibility)), *cert. denied*, 114 S. Ct. 1835 (1994); *Bivens Garden Office Bldg. v. Barnett Bank*, 906 F.2d 1546, 1550 (11th Cir. 1990) (while no overt act required for criminal responsibility, civil responsibility stems “not from the mere existence of a conspiracy, but from the commission of an overt act in furtherance of the conspiracy that cause injury”) (citing *Sedima*, 473 U.S. at 496-97), *cert. denied*, 500 U.S. 910 (1991).

doctrine of standing in the federal courts is a complex intermixture of prudential rules formulated by the judiciary, statutory law, and constitutional limitations.<sup>426</sup> While Congress may not “abrogate the Art. III minima” of a case or controversy, it “may, by legislation, expand standing to the full extent permitted by Art III” without regard to “prudential standing rules.”<sup>427</sup> Under § 1964(c), “standing” may be used in several different, but not necessarily mutually exclusive, senses: “victim” (“any person”), “injury” (“in his business or property”), “cause” (“by reason of”), and “claim” (“violation”).<sup>428</sup> Unfortunately, the courts of appeals did not carefully analyze the various senses in which “standing” could be used; in particular, the courts conflated “predicate act” and “overt act” standing and “violation” and “injury” standing.

Consistent with RICO’s Liberal Construction Directive<sup>429</sup> and the approach of common law civil conspiracy, the Third and Seventh Circuits correctly held that a person possesses “standing” to bring a civil action for a RICO conspiracy if he was injured in his business or property by an overt act in furtherance of the conspiracy. The courts further held that the overt act need not also be “racketeering activity” as defined under § 1961(1), and the person need not possess independent “standing” to sue for the substantive offenses under § 1962(a), (b), or (c).<sup>430</sup>

Despite RICO’s Liberal Construction Directive and the approach followed for

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426. *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 99-100 (1979).

427. *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

428. For the most succinct, perceptive, and discriminating treatments of “standing” under RICO, see *Ocean Energy II v. Alexander & Alexander*, 868 F.2d 740, 743-48 (5th Cir. 1989) (Thornberry, J.); *In re Sunrise Sec. Litig.*, 916 F.2d 874, 878-82 (3d Cir. 1990).

429. 84 Stat. 941 (1970); see *supra* note 7 (discussing liberal construction).

430. *Schiffels*, 978 F.2d at 348-49 (stating that

[Since] RICO conspiracy is governed by traditional concepts of conspiracy law . . . a conspiracy to violate RICO should not require anything beyond that required for a conspiracy to violate any other crimes. . . . [S]ince RICO conspiracy does not require the actual commission of a predicate act, it follows that the act causing plaintiff’s injury need not be a predicate act of racketeering. A person directly injured by an overt act in furtherance of a RICO conspiracy has been injured ‘by reason of’ the conspiracy. Since a conspiracy to violate RICO’s substantive provisions is itself a violation of RICO, . . . a person injured ‘by reason of’ the conspiracy has been injured ‘by reason of’ the RICO violation. That is all that § 1964(c) requires for standing to bring a civil RICO action.);

*Shearin*, 885 F.2d at 1169 (stating that

Predicate acts for conspiracy do not of necessity consist of § 1961(1) racketeering activity. To the contrary, a conspiracy to commit the other RICO violations may occur absent the actual commission of the other violations or the racketeering activities that underpin them. All that need be shown is that the conspirators agreed to engage in a pattern of racketeering activity. . . . Acts that further a section 1962(d) conspiracy thus may cause harm even when they do not themselves qualify as racketeering activity. Taking into account all the provisions of section 1962, either racketeering activity or classic overt conspiracy acts may qualify as ‘predicate acts’ to a RICO violation that causes injury.)

(citations omitted).

common law conspiracy, the First, Second, Eighth, and Ninth Circuits indefensibly limited standing under § 1964(c). They required a person injured in his business or property by reason of a violation of RICO under § 1962(d) to be injured, not just by an overt act, but by “racketeering activity” under § 1961(1). Nevertheless, they did not require him also to possess standing to sue under the substantive offense under § 1962(a), (b), or (c).<sup>431</sup>

Wholly without justification, the Tenth and District of Columbia Circuits held that standing under § 1964(c) to sue for injury to business or property by reason of a violation of § 1962(d) for a conspiracy to violate § 1962 (a), (b), or (c) depended on standing to sue for injury under § 1962(a), (b), or (c). Accordingly, they effectively read § 1962(d) out of RICO for the purpose of civil claims for relief. The reasoning adopted by these two circuits conflated a “violation” of § 1962(a), (b), or (c), and standing to sue for injury by such violation, with a “violation” of § 1962(d) and standing to sue for injury under it. Obviously, if particular conduct does not constitute a violation of § 1962(a), (b), or (c), an agreement to engage in it cannot be a conspiracy in violation of § 1962(d). A person cannot, therefore, show an injury to business or property by reason of a violation of § 1962 for the purpose of § 1964(c). Those decisions that find that allegations failing to state a violation of § 1962(c) cannot serve, where an agreement is also alleged, to support a § 1962(d) claim for relief, are therefore correctly decided.<sup>432</sup>

The Tenth Circuit, however, unjustifiably transformed this sort of straightforward holding—with no meaningful analysis—into a rule that conflated “standing” to sue for “injury” under § 1962(a) with “standing” to sue for “injury” under § 1962(d), where the objective of the agreement is a “violation” of § 1962(a), even though the person could not show “investment or use” injury by reason of the violation of § 1962(a). In *Grider v. Texas Oil & Gas Corp.*,<sup>433</sup> the Tenth Circuit—without analysis or rationale—held that, “[plaintiff] has no standing to assert a claim for damages based on a violation of section 1962(a). . . . Because he

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431. *Bowman*, 985 F.2d at 388 (“We hold that standing to bring a civil suit pursuant to 18 U.S.C. § 1964(c) and based on an underlying conspiracy violation of 18 U.S.C. § 1962(d) is limited to those individuals who have been harmed by a § 1961(1) RICO predicate act committed in furtherance of a conspiracy to violate RICO.”); *Miranda*, 948 F.2d at 48 (“An actionable claim under [§ ] 1962(d) . . . requires that the complainant’s injury stem from a predicate act within the purview of 18 U.S.C. § 1961(1).”); *Reddy v. Litton Indus.*, 912 F.2d 291, 295 (9th Cir. 1990) (“[W]e hold that the district court did not err in dismissing [plaintiff’s] § 1962(d) claim on standing grounds because the act of terminating [plaintiff’s] employment is not a predicate act as defined by § 1961(1) . . .”), *cert. denied*, 502 U.S. 921 (1991); *Hecht*, 897 F.2d at 25 (“[S]tanding may be founded only upon injury from overt acts that are also section 1961 predicate acts, and not upon any and all overt acts furthering a RICO conspiracy.”).

432. *See, e.g.,* *Torwest DBC v. Dick*, 810 F.2d 925, 927-28 & n.2 (10th Cir. 1987) (absent an allegation of a § 1962(c) violation, a § 1962(d) civil conspiracy claim cannot be sustained; “our resolution of the § 1962(c) claim is dispositive of the conspiracy claim as well.”); *see also* *Religious Technology Center v. Wollersheim*, 971 F.2d 364, 367 n.8 (9th Cir. 1992) (same); *Glessner*, 952 F.2d at 714 (same); *Miranda*, 948 F.2d at 45 n.4 (same); *Pyramid Sec. v. IB Resolution*, 924 F.2d 1114, 1120 (D.C. Cir.) (same), *cert. denied*, 502 U.S. 822 (1991).

433. 868 F.2d 1147 (10th Cir.), *cert. denied*, 493 U.S. 820 (1989).

has not alleged injury from the substantive violations, he has failed to show how the alleged conspiracy to commit those violations caused him injury.”<sup>434</sup> In brief, the Tenth Circuit conflated “injury” under § 1962(a) with a “violation” of § 1962(a). Section 1962(d), however, requires only that a “violation” of § 1962 be the object of the RICO conspiracy; it does not also require that the “victim” of the § 1962(d) conspiracy also be a “victim” of the § 1962(d) “violation.” Such “injury” may be easily shown by establishing either an overt act or predicate act injury, neither of which need be “investment or use injury.”

The District of Columbia Circuit reached a similar disappointing result in *Danielson v. Burnside-Ott Aviation Training Center*,<sup>435</sup> where Judge David Sentelle not only used the sort of *ispa dixit* reasoning employed by the Tenth Circuit in *Grider*, but also offered arguments that were on their face self-contradictory. Going beyond the briefs filed by the plaintiff—and illustrating the lack of wisdom of deciding a case based upon issues that were not fully briefed—Judge Sentelle adopted an “investment or use” injury limitation on standing to sue for injury under § 1962(a) and an “acquisition or maintenance” injury limitation on standing to sue for injury under § 1962(b). Judge Sentelle then sought to justify the adoption of the limitations by arguing that the court was bound to give independent meaning to *each* subsection of § 1962. “We are required to interpret acts of Congress in such a fashion as to give meaning to each word of the statute . . . . To hold otherwise would render one of the two subsections [§ 1962(a) or (c)] of the same statute redundant.”<sup>436</sup> Dismissing the § 1962(d) claim, the court held that § 1962(d) “adds nothing substantive to the law.”<sup>437</sup> Had the court followed its own analysis of § 1962(a), (b), and (c), it would have given independent meaning to § 1962(d). Accordingly, it, too, conflated standing to assert an “injury” for a “violation” of § 1962(a), (b), or (c) with standing to assert an “injury” for a violation of § 1962(d), where a conspiracy was alleged in violation of § 1962(d) (the object of which was a violation of § 1962(a), (b), or (c)). In brief, the court failed to distinguish between “violation” and “injury,” and it read § 1962(d) out of the statute. The results in *Grider* and *Danielson* cannot be squared with the text of RICO, its Liberal Construction Directive, or well-established civil conspiracy law, including prior decisions from the District of Columbia Circuit itself.<sup>438</sup>

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434. *Id.* at 1151 (citation omitted).

435. 941 F.2d 1220 (1991).

436. *Id.* at 1230.

437. *Id.* at 1232.

438. Compare *Griffin*, 403 U.S. at 103 (holding overt act in furtherance of § 1985(3) conspiracy actionable) and *Lenard v. Argento*, 699 F.2d 874, 883 (7th Cir.) (insufficient evidence of § 1983 substantive violation does not preclude civil action based on § 1985(3) conspiracy), *cert. denied*, 464 U.S. 815 (1983), with *Lawrence v. Acree*, 665 F.2d 1319, 1324 (D.C. Cir. 1981) (“We decline to deprive [§ ] 1985 and other civil conspiracy statutes of significant meaning by requiring that each overt act in furtherance of the conspiracy be independently actionable.”).



## V. GIVING POSITIVE MEANING TO THE *REVES* OPERATION OR MANAGEMENT TEST

### A. Introduction

In *Reves*, the Supreme Court quietly laid to rest the Eleventh Circuit's least restrictive standard of "conduct" as described in *Bank of America* by hardly mentioning it. Further, the Supreme Court gave the *en banc* opinion of the District of Columbia Circuit's most restrictive test of "conduct," set forth in *Yellow Bus*, an ignominious burial in a footnote that rejected it without rebutting it.<sup>439</sup> Each of these efforts by respected federal courts of appeals, particularly that of the District of Columbia Circuit, which, after all, sat *en banc*, deserved a more craftsmanlike handling. The Supreme Court's solution, however, was to "compromise" and use the Eighth Circuit's *Bennett* "operation or management" test for the meaning of "conduct."<sup>440</sup> Unfortunately, this test—without substantial elaboration—provides little guidance to the lower courts. Indeed, Justice Blackmun's opinion in *Reves* tells us more about what the law is not than what it is.

In giving positive meaning to the *Reves* test, two points must be made initially. First, the Court's decision will not affect professionals' and others' RICO liability under accomplice or conspiracy theories of liability because the Court's opinion was drafted solely from the perspective of determining the liability of a principal in the first degree.<sup>441</sup> Second, the "operation or management" test will affect other

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439. See *supra* note 60 and accompanying text (discussing the *Reves* response to *Yellow Bus*).

440. See *supra* Part III. B. 1., (discussing the "operation or management" test as defined in *Reves*).

441. See *ACC/Lincoln*, 1994 U.S. App. LEXIS 13184, at \*9-10 ("[*Reves*] merely determined what was meant by operating or managing a RICO enterprise for the purpose of deciding whether there was any RICO liability at all."). *Accord Accomplish*, 1 ENCYCLOPEDIA OF CRIMINAL JUSTICE 9-10 (1967) ("Statutes are usually drafted in such a way that mention is made only of the primary actor, or perpetrator . . . Doctrines of accomplice liability, whether derived from the common law or formulated by statute, serve to extend criminal liability to others besides the actual perpetrator.").

*The ACC/Lincoln* decision asserts the answer. What, if anything, can be said legally in support (or in opposition) to its holding? Should RICO be read—criminally and civilly—to have accomplice liability? Four basic assumptions are integral to any principled effort to interpret a statute: (1) legislative supremacy within the constitutional framework; (2) the use of the statutory vehicle to exercise that supremacy; (3) reliance on accepted means of communication; and (4) reasonable availability of the statutory vehicle to those governed by, not only its text, but any other part of its legislative context that serves to give it meaning. REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 7-12 (1975). Accordingly, any effort to read RICO must begin with its text. Its statutory structure, legislative history and congressional policy as well as language are, however, each important. Where its language, syntax, or context is ambiguous, that construction that would "effectuate its remedial purpose" "by providing enhanced sanction and new remedies" ought to be adopted. 84 Stat. 923, 927 (1970).

In its principal RICO decisions, including *NOW v. Scheidler*, 520 U.S. 249 (1994); *Alexander v. United States*, 509 U.S. 544 (1993); *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992); *Tafflin v. Levitt*, 493 U.S. 455 (1990); *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989); *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989); *United States v. Monsanto*, 491 U.S. 600 (1989); *Agency Holding Corp. v. Malley-Duff & Assoc.* 483 U.S. 143 (1987); *Sedima v. Imrex Co.*, 473 U.S. 479 (1985), and *Russello v. United States*, 464 U.S. 16 (1983), the Supreme Court acknowledged several general propositions of statutory construction, established the basic principles that govern the interpretation of RICO, and consistently applied

issues depending on the "enterprise" under RICO selected by the prosecutor or civil plaintiff. Unless due attention is focused on *what* is being operated or managed, the *Reves* test is of little concrete meaning.

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them to the statute:

(1) read the language of the statute, *NOW*, 114 S. Ct. at 804; *Holmes*, 503 U.S. at 266; *Tafflin*, 493 U.S. at 460; *H.J., Inc.*, 492 U.S. at 237 (citing *Russello*); *Monsanto*, 491 U.S. at 606 (citing *Turkette*); *Shearson*, 482 U.S. at 227; *Sedima*, 473 U.S. at 495 n.13; *Russello*, 464 U.S. at 20 (citing *Turkette*); *Turkette*, 452 U.S. at 580, 593.

(2) language includes its structure, *NOW*, 114 S. Ct. at 804; *Agency Holding Corp.*, 483 U.S. at 152; *Sedima*, 473 U.S. at 489-90 n.8, 496 n.14; *Russello*, 464 U.S. at 22-23; *Turkette*, 452 U.S. at 581, 587.

(3) language should be read in its ordinary or plain meaning, but must be viewed in context, *H.J., Inc.*, 492 U.S. at 238 (citing *Richards v. United States*, 369 U.S. 1, 9 (1962)); *Sedima*, 473 U.S. at 495 n.13; *Russello*, 464 U.S. at 20 (citing *Turkette*), 21-23, 25; *Turkette*, 452 U.S. at 580, 587.

(4) language should not be read differently in criminal and civil proceedings, *H.J., Inc.*, 492 U.S. at 236 (citing *Sedima*); *Shearson*, 482 U.S. at 239-40; *Sedima*, 473 U.S. at 489, 492.

(5) look to the legislative history of the statute, *Holmes*, 503 U.S. 267; *Tafflin*, 493 U.S. at 461; *H.J., Inc.*, 492 U.S. at 236-39 (citing *Sedima*); *Monsanto*, 491 U.S. at 613; *Agency Holding Corp.*, 483 U.S. at 151; *Shearson*, 482 U.S. at 238-41; *Sedima*, 473 U.S. at 486, 489; *Turkette*, 452 U.S. at 586, 588-91, but it takes clear legislative history to vary the text, *NOW*, 114 S. Ct. at 806 (citing *Turkette* and *Reves*); *Reves*, 113 S. Ct. at 1169 (citing *Turkette*); *Turkette*, 452 U.S. at 580.

(6) look to the policy of the statute, *Tafflin*, 493 U.S. at 467; *Sedima*, 473 U.S. at 493; *Russello*, 464 U.S. at 24; *Turkette*, 452 U.S. at 590.

(7) the statute was aimed at the infiltration of legitimate business by organized crime, *NOW*, 114 S. Ct. at 805 (citing *H.J., Inc.*); *H.J., Inc.*, 492 U.S. at 242-49 (citing *Sedima*); *Sedima*, 473 U.S. at 495, 499; *Russello*, 464 U.S. at 28; *Turkette*, 452 U.S. at 590-91.

(8) the statute is to be broadly read and liberally construed, *Holmes*, 503 U.S. at 274; *Tafflin*, 493 U.S. at 467 (citing *Sedima*); *H.J., Inc.*, 492 U.S. at 237; *Monsanto*, 491 U.S. at 609 (citing *Sedima*); *Sedima*, 473 U.S. at 491-92 n.10, 497-98; *Russello*, 464 U.S. at 21; *Turkette*, 452 U.S. at 587, 593;

(9) where Congress rejects proposed limiting language in a bill, it may be presumed that the limitation was not intended, *Russello*, 464 U.S. at 23.

Nevertheless, more than 100 years ago the Supreme Court noted that "[i]t is easy, by very ingenious and astute construction, to evade the force of almost any statute, where a court is so disposed. . . . [By] [s]uch a construction [it is possible to annul the statute] and [render] it superfluous and useless." *Pillow v. Roberts*, 54 U.S. 472, 476 (1851) (Grier, J.). Dean Roscoe Pound concluded that such "ingenious and astute" constructions (1) "tend[ed] to bring law into disrespect; (2) . . . subject[ed] the courts to political pressure; [and] (3) . . . invite[d] an arbitrary personal element in judicial administration." III ROSCOE POUND, *JURISPRUDENCE* 88 (1959). It threatened to make "laws . . . worth little" and to "break down" the "legal order" itself. *Id.* at 490.

Here, as elsewhere, reading RICO is basically a question of the "language of the statute . . . —the most reliable evidence of its intent." *Turkette*, 452 U.S. at 593; see also HENRY FRIENDLY, *BENCHMARKS* 202 (1967) ("(1) Read the statute; (2) read the statute; (3) read the statute!") (quoting Justice Frankfurter). The basic principles for reading that language should not vary here from those already established by the Supreme Court in other contexts. Title 18 of the United States Code, of which RICO is a part, is "codified and . . . positive law." Act of June 25, 1948, c. 645, § 1, 62 Stat. 683; see 1 U.S.C. §§ 112 (statutes at large, not titles of code, are authoritative), 204 (titles of code, if positive law, are authoritative) (1994); see also, J. MYRON JACOBSTEIN & ROY M. MERSKY, *FUNDAMENTALS OF LEGAL RESEARCH*, 143-45 (1987) (discussing reading of statutes). In particular, RICO is Chapter 96 of Title 18; it is not an independent or free standing statute, as are, for example, the securities laws or the antitrust statutes. See, e.g., *Central Bank*, 114 S. Ct. at 1450-52 (Title 18 contrasted with specific statutes). As

Negatively, *Reves* holds that a person may *not* be found to have "operated or managed" the enterprise *merely* by aiding and abetting the affairs of the enterprise.<sup>442</sup> *Reves* recognizes, however, that a person *is* liable under RICO where he

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the Ninth Circuit's opinion in *ACC/Lincoln* holds, the individual provisions of Title 18 were drafted from the perspective of the criminal liability of a principal in the first degree. Neither accessories nor aiders nor abettors are expressly mentioned in each substantive offense. Their mention comes in Chapter 1. General Provisions, which applies throughout the Title. 18 U.S.C. § 2. "[A]iding and abetting 'is not a separate offense' from the underlying substantive crime." *United States v. Mitchell*, 23 F.3d 1, 2-3 (1st Cir. 1994) (quoting *United States v. Sanchez*, 917 F.2d 607, 611 (1st Cir. 1990), *cert. denied*, 499 U.S. 977 (1991)). Indeed, it is not even necessary to expressly charge aiding and abetting before the jury may be instructed on it and may return a verdict on that theory of liability. *Sanchez*, 917 F.2d at 611; *accord* *Standefor v. United States*, 447 U.S. 10, 19 (1980) (accessories may be convicted even without conviction of underlying perpetrator); *Adams*, 914 F.2d at 1407 (laws distinguishing between perpetrators and aiders and abettors is "all but abandoned"). Since § 2 expressly makes *all* accessories before the fact and aiders and abettors liable for *any* offense under Title 18 "punishable as a principal," 18 U.S.C. § 2, repeating accessory or aiding and abetting language in each substantial offense under Title 18 is not necessary. *See, e.g.*, *United States v. Tobon-Builes*, 706 F.2d 1092, 1099 (11th Cir. 1983) (reference to § 2 in § 1001 omitted as unnecessary by revisors); Sharon C. Lynch, *Drug Kingpins and Their Helpers: Accomplice Liability under 21 U.S.C. Section 848*, 58 U. CHI. L. REV. 391, 395 (1991) ("The original accomplice liability statute had two purposes: abolishing the common law distinctions between different levels of accomplice liability, and eliminating the need to attach an aiding and abetting section to each new substantive offense."). As Judge Posner stated in *Pino-Perez*, "Congress doesn't have to think about aider and abettor liability when it passes a new criminal statute, because section 2(a) attaches automatically. The question is not whether section 2(a) is applicable—it always is." 870 F.2d at 1233. Nevertheless, RICO's text, expressly incorporates § 2 by making its criminal and civil provisions dependent on "violations." 18 U.S.C. § 1963 ("Whoever *violates* any provision of Section 1962 . . .") (emphasis added); 18 U.S.C. § 1964 ("Any person injured . . . by . . . a *violation* of section 1962 . . .") (emphasis added). "Violation" does not have a different meaning in the two sections because the definition of the word is not different in its verb or noun form. XIX THE OXFORD ENGLISH DICTIONARY 653 (2d ed. 1989). *See Reves*, 113 S. Ct. at 1169 ("[I]t seems reasonable to give each use [as a verb and as a noun] a similar construction."); *Sedima*, 473 U.S. at 489 ("We should not lightly infer that Congress intended [violations] to have wholly different meanings in neighboring [sections.]"). As Justice Cardozo commented in *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 378 (1933), "[t]here is a unity of verbal structure that is a symptom of an inner unity, a unity of plan and function." *See also* *Perrine v. Chesapeake & Delaware Canal Co.*, 50 U.S. (9 How.) 172, 187 (1850) (Taney, C.J.) ("An interpretation of [a] statute which would . . . render different sections inconsistent with each other, cannot be the true one."). In litigation not involving the collection of an unlawful debt, a "violation" of § 1962 expressly requires a "pattern of racketeering activity." 18 U.S.C. § 1962. "Racketeering activity" is expressly defined in each paragraph of § 1961(1) with words that refer to *criminal* jurisprudence. *Id.*, § 1961(1)(A) ("any act . . . *chargeable* under State law and punishable") (emphasis added); § 1961(1)(B) ("any act . . . *indictable* under . . . [specified] provisions of title 18") (emphasis added); § 1961(1)(C) ("any act . . . *indictable* under [specific provisions of] title 29") (emphasis added); § 1961(1)(D) ("any [specified] offense . . . *punishable*") (emphasis added); or § 1961(1)(E) ("any act . . . *indictable* under the Currency and Foreign Transaction Reporting Act") (emphasis added). Acts constituting aiding and abetting a substantive offense are "indictable" as the substantive offense. *See, e.g.*, *United States v. Oates*, 560 F.2d 45, 53-55 (2d Cir. 1977) (one who aid and abets may be charged as if he committed the crime himself), *aff'd*, 591 F.2d 1332 (2d Cir. 1978); *United States v. Private Sanitation Indus. Ass'n*, 793 F. Supp. 1114, 1134 (E.D.N.Y. 1992) (mail fraud) (aider and abettor charged as if committed underlying crime); *Firemen's Fund Ins. Co. v. Plaza Oldsmobile Ltd.*, 600 F. Supp. 1452, 1456 n.2 (E.D.N.Y. 1985) (mail fraud) (same). That the drafters of RICO's provisions contemplated the application of criminal and civil accessory and aiding and abetting theory, therefore, ought to be beyond serious question. The express reference to § 2 in § 1962(a) (investment or use) was included to assure that the prohibition of the investment or use of the proceeds of racketeering activity did not extend to accessories after the fact; it was not included to preclude accomplice liability under § 1962(b) (acquire or maintain) and (c) (conduct or participate). H.R. REP. NO. 91-1549 at 57 (1970); S. REP. NO. 91-617 at 122-23, 159 (1969); *Measures Relating to*

acts under the direction of a defendant who is involved in the operation or management of the enterprise and who is conducting the affairs of the enterprise through a pattern of racketeering activity.<sup>443</sup> The Court observed, “the word ‘participate’ makes clear that RICO liability is not limited to those with primary responsibility for the enterprise’s affairs.”<sup>444</sup> Those who have secondary responsibility for the enterprise’s affairs are, of course, traditionally held liable as accessories or aiders and abettors. Nothing in *Reves* expressly alters accepted principles of liability for accessories or principals in the second degree. Accordingly, a person should be liable for a RICO violation either as a principal in the first degree (if he actually commits the substantive RICO violation), as an accessory before the fact (if he orders, counsels, encourages, or otherwise helps another to commit the substantive RICO violation, but is not actively or constructively present), or as a principal in the second degree (if he is an aider and abettor who helps or assists in the commission of the substantive RICO violation and is actually or constructively present).<sup>445</sup> Thus, for example, an accounting firm or a law firm that knowingly prepares false audits, reports, or other legal papers at the request of the chief executive officer of a corporation with intent to facilitate that officer’s pattern of racketeering activity in the conduct of the corporation’s affairs should be held liable under RICO. That result ought to follow as a matter of the application of well-settled, albeit sometimes confusing, concepts of accomplice or conspiracy liability under general federal criminal jurisprudence, as well as under RICO.

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*Organized Crime: Hearing on S.30 Before the Senate Judiciary Subcomm. on Crim. Laws and Proc., 91st Cong., 1st Sess.* (1969) (letter of Deputy Attorney General Kleindienst). § 1962(d) (conspiracy) was also expressly included in § 1962 to eliminate the overt act requirement applicable when § 371 is used under RICO, to raise the penalty for conspiracy under RICO to twenty years from five years under § 371, and to authorize consecutive sentences under RICO and § 371; it was *not* included to provide for conspiracy, but not aiding and abetting liability, under RICO. S. REP. NO. 91-617, at 159 (citing *Singer*, 323 U.S. 338 (no overt act required if not expressly set out)); *Barton*, 647 F.2d at 236-38 (Section 1962(d) does not require overt act; § 371 applicable to RICO; consecutive sentences authorized). Finally, if a straightforward textual reading of RICO does not lead to a finding of criminal and civil accomplice liability and “a clear tie-breaker” is necessary, because “contextual analysis” results in a “tie,” *Reves*, 113 S. Ct. at 1175 (Souter, J., in dissent), then the Liberal Construction Clause ought to be read to play that role. Reading the possibility of accomplice liability or RICO’s provision of conspiracy liability in terms of the maxium *Expressio Unius*, etc. to exclude accomplice liability or to create a new, but narrower form of conspiracy liability—either criminally or civilly—is squarely inconsistent with RICO’s Liberal Construction Clause. *Reves*, 113 S. Ct. at 1172 (clause “ensure[s] that Congress’ intent is not frustrated by an overly narrow reading of the statute”); *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51 (1943) (*Expressio Unius*, etc. gives way to statutory intent and policy); *United States v. Barnes*, 222 U.S. 513, 519 (1912) (*Expressio Unius*, etc. is “a rule of construction, not of substantive law”). See generally Henry A. LaBrun *supra* note 3, at 182-193 (discussing general civil and criminal rules of accountability in context of RICO’s codification in Title 18). Such a course of judicial interpretation can not be convincingly defended. Accordingly, RICO ought to be read—as matter of its text, its Liberal Construction Clause, and general jurisprudence—to carry accomplice liability—criminally and civilly.

442. *Reves*, 507 U.S. at 179 (emphasis added).

443. *Id.* at 184 (holding that lower-rung employees or associates operate the enterprise if they do so at the direction of upper management).

444. *Id.* at 179.

445. See *supra* note 148 (discussion of complicity).

Positively, if its meaning is to be fleshed out, the *Reves* test must be considered in the context of "enterprise liability" in other areas of substantive law. Such an analysis puts into sharp relief the various kinds of RICO enterprises that may be present and gives a hard edge to the "operation or management test." Justice Oliver Wendell Holmes had a favorite admonition, "[t]hink things not words."<sup>446</sup> In other words, if concrete images can be brought into the discussion, analysis is facilitated.<sup>447</sup> Similarly, because a defendant will not be held liable under § 1962(c) unless he, she, or it operates or manages the affairs of an "enterprise" through a "pattern of racketeering activity," an understanding of the flexible nature of the "enterprise" concept under RICO is also essential.<sup>448</sup> "The outcome of litigation

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446. FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 1 (Atheneum 1965).

447. When *Roth v. United States*, 354 U.S. 476 (1957), was argued before the Supreme Court, the Solicitor General sent up to the Justices several crates of the vilest sort of pornography and, as a result, an abstract argument over "obscenity" was quickly brought down to earth. See William B. Lockhart and Robert C. McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 25-26 (1960) (discussing obscenity and the Supreme Court). A similar tack needs to be taken in discussions of RICO, particularly when undifferentiated general allegations of litigation abuse are made. GEORG W.F. HEGEL, *PHILOSOPHY OF HISTORY*, Part IV, § 3, ch. 2, at 537 (American Dome Library 1902) ("[W]hen liberty is mentioned, we must always be careful to observe whether it is not really the assertion of private interest which is clearly designated.").

448. An example of the flexible use of the enterprise concept may be found in *City of Philadelphia v. Public Employees Benefit Servs. Corp.*, 842 F. Supp. 827 (E.D. Pa. 1994). In *City of Philadelphia*, the city sued PEBSCO, its deferred compensation plan manager, because PEBSCO allegedly made material misrepresentations to city employees about the life insurance available under the plan. *Id.* at 829. The city alleged that the plan was the enterprise, but, in the alternative, identified the city as the enterprise. The city was unable to prove its case using the plan as the enterprise because it lacked the necessary elements, at least in the district court's view. *Id.* 833-85. Nevertheless, the court found that the city's alternative allegation that it was operated or managed by PEBSCO to be sufficient at the pleading stage. *Id.* at 835.

Two lessons can be learned by analyzing the *City of Philadelphia* decision. First, the enterprise concept may be flexibly used to effectuate RICO's broad remedial purposes. Second, to "manage" the city, PEBSCO did not have to "manage" the city's entire business; it was sufficient to possess sole control of one lucrative aspect of the city's business. Compare, *United States v. Computer Sciences Corp.*, 511 F. Supp. 1125, 1131 (E.D. Va. 1981), ("Allowing the definition of the enterprise to shift for each co-defendant would make the enterprise element more of an intellectual exercise for ingenious prosecutors than a critical element in the offense—an element essential to carrying out Congress's purpose."), *rev'd in part*, 689 F.2d 1181 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1982), and *Glessner*, 952 F.2d at 714 ("We are concerned about the alacrity with which plaintiffs appear to grasp at any theory of alignment of parties which might withstand dismissal. A RICO complaint is not a mix and match game in which plaintiffs may artfully invoke magic words to avoid dismissal."), *with Cox*, 17 F.3d at 1406 (upholding alternative allegation identifying enterprise), and *Petro-Tech*, 824 F.2d at 1358-61 (upholding RICO counts because different enterprises alleged in each count). This line of analysis—looking for an alternative enterprise—may also be helpfully applied to the facts in *Reves* itself. A partnership may, of course, be an enterprise. See, e.g., *First Fed. Sav. & Loan Ass'n v. Oppenheim, Appel, Dixon & Co.*, 629 F. Supp. 427, 446 (S.D.N.Y. 1986) (accounting firm); *United States v. Jannotti*, 501 F. Supp. 1182, 1185-86 (E.D. Pa. 1980) (law firm), *rev'd on other grounds*, 673 F.2d 578 (3d Cir. 1982), *cert. denied*, 457 U.S. 1106 (1982). If the trustees in *Reves* had identified Ernst & Young (then Arthur Young and Company) as the "enterprise" and the individual auditors as the "persons," the *Reves* "operation or management" test would have been met. Recovery would not have been obtained against the "enterprise" under the person-enterprise rule, but at least the *Reves* test itself would not have been a bar to recovery. See generally LaBrun, *supra* note 3, at 664-69 (analyzing person-enterprise rule, but rejecting it). But see *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1412 (3d Cir. 1993) (holding parent corporation not distinct from its subsidiary unless the parent plays role distinct from activity of subsidiary);

brought under [RICO] is dependent upon the proper use of the enterprise concept."<sup>449</sup> The concept of "enterprise," too, remains constant regardless of the type of RICO action; thus, criminal prosecutions are relevant to interpret the meaning of "enterprise" in civil RICO actions.

The concept of the "enterprise" was selected by Congress when it enacted RICO because it desired to use "terms and concepts of breadth."<sup>450</sup> Indeed, the statute itself broadly describes "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of

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*Glessner*, 952 F.2d at 713 (finding individual officers and employees of enterprise not distinct unless pattern of racketeering activity extends beyond affairs of enterprise). Neither *Lorenz* nor *Glessner* can be squared with the Third Circuit's prior ruling in *Petro-Tech*, 824 F.2d at 1359 (holding officer and employees of corporation distinct), nor the dicta in *Genty*, 937 F.2d at 913 (notwithstanding doctrine of municipal immunity, plaintiff may have a RICO claim against municipal officers themselves), the decisions of other circuits, or sound public policy. See, e.g., *United States v. Robinson*, 8 F.3d 398, 406-07 (7th Cir. 1993) (argument that corporate officer and controlling shareholder were inseparable from the corporation termed "meritless"); *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1533-34 (9th Cir. 1992) (allowing RICO prosecution of corporation and its officers); *Miranda*, 948 F.2d at 45 (same); *United States v. Gelb*, 881 F.2d 1155, 1164 (2d Cir.) (same), *cert. denied*, 493 U.S. 994 (1989); *Ashland Oil*, 875 F.2d at 1280 (same); *Schreiber Distrib. Co.*, 806 F.2d at 1398 (same); *McCullough v. Suter*, 757 F.2d 142, 144 (7th Cir. 1985) ("The only important thing is that [the enterprise] be either formally (as when there is incorporation) or practically (as when there are other people besides the proprietor working in the organization) separable from the individual."); *Haroco*, 747 F.2d at 399-403 (holding parent corporation separate and distinct from subsidiary); *Bennett v. Berg*, 685 F.2d 1053, 1061 (8th Cir. 1982) (same), *cert. denied*, 464 U.S. 1008 (1983). Even in *Computer Sciences*, 689 F.2d at 1190, the Fourth Circuit sustained a § 1962(c) conviction against employees who conducted the affairs of the corporation/enterprise through a pattern of racketeering. Although in *Petro-Tech* the Third Circuit stated in dictum that § 1962(c) "was intended to govern only those instances in which an 'innocent' or 'passive' corporation is victimized," 824 F.2d at 1359, the court applied § 1962(c) where the enterprise was allegedly the perpetrator and recipient of the racketeering proceeds, and held that the enterprise was not innocent and not passive, and the claim was not asserted against it but its officers and employees. *Id.*; see also 2 ARTHUR F. MATTHEWS, ET AL., CIVIL RICO LITIGATION § 6.03[B], at n.98 (2d ed. 1992) (majority rule is the "only correct result"); Michael Goldsmith, *Judicial Immunity For White Collar Crime: The Ironic Demise of Civil RICO*, 30 HARV. J. ON LEGIS. 1, 37-38 (1993) ("[*Glessner*] finds no support in the statutory text . . . , the legislative history [, or] . . . the policy considerations underlying RICO . . . taken to an extreme, the absurd message suggested by *Glessner* for organized-crime groups is clear: incorporate formally . . . and you will enjoy immunity from RICO."). The *Glessner* and *Lorenz* rulings are also sharply inconsistent with public corruption prosecution under RICO. See *Blakey & Perry*, *supra* note 3 (28% of criminal RICO indictments charge public corruption). If a corporate officer cannot be a "person" distinct from a corporation/enterprise, how can a government employee be a "person" separate from the governmental agency/"enterprise"? Yet public corruption cases are consistently prosecuted under RICO on that theory, including those brought in the Third Circuit. See, e.g., *Rose v. Bartle*, 871 F.2d 331, 358-59 (3d Cir. 1989); *Stratton*, 649 F.2d at 1074-75; *United States v. Bachelier*, 611 F.2d 443, 450 (3d Cir. 1979). The same implications are posed for RICO lawsuits designed to free labor unions of mob domination, an area in which the Third Circuit is at the forefront. See, e.g., *United States v. Local 560 (I.B.T.)*, 974 F.2d 315, 322, 348 (3d Cir. 1992). Fortunately, the Third Circuit abandoned its singular position in *Jaguar Cars v. Royal Oaks Motor Car Co.*, 46 F.3d 258, 262-65 (3d Cir. 1995). Unfortunately, its previous jurisprudence did harm at the state level. See, e.g., *Kilminster v. Day Mgmt. Corp.*, 890 P.2d 1004, 1009-10 (Or. App. 1995) (following *Glessner-Kerny*), *review granted*, 899 P.2d 1197 (1995). Unfortunately, too, the *Jaguar Cars* decision is not without its own problems. See *infra* note 839 (discussion of *LaSalle Bank* decision).

449. LaBrun, *supra* note 3, at 646 (footnotes omitted).

450. *Russello*, 464 U.S. at 21. The best student piece on the "enterprise" concept is O'Neill, *supra*, note 3.

individuals associated in fact although not a legal entity.”<sup>451</sup> Thus, *any* legal entity may be an enterprise,<sup>452</sup> and any group of persons—in any combination of natural and legal persons—may also constitute an enterprise, even though it is not a legal entity, by being an association-in-fact.<sup>453</sup> The definition of “enterprise,” includes licit and illicit entities. Further, in *United States v Turkette*,<sup>454</sup> the Supreme Court held that associations-in-fact that were solely illicit, that is, possessed only *criminal* ends, were also enterprises.<sup>455</sup> Thus, because an association-in-fact possesses only *criminal* purposes does not keep it from being an “enterprise.”

The crucial point here is simple: the *Reves* test will point toward different results in litigation involving different kinds of “enterprises” because how they are operated or managed will vary with the characteristics of each kind of “enterprise.” Associations-in-fact formed for wholly illicit purposes will, for example, likely be treated somewhat differently than licit associations. In all likelihood, participants in such illicit associations will be held to be joint managers (or at least accessories, aiders and abettors, or coconspirators of the other participants) because each one will share a common purpose with the other. Legal entities, such as corporations, that are involved in lawful behavior, as well as a pattern of racketeering activity, will be treated differently from associations-in-fact, and so, too, will the various other kinds of legal entities. Accordingly, the possibility of not operating or managing or acting as an accessory, an aider or abettor, or a conspirator will come more sharply to the forefront.

### B. Legal Entities

A RICO enterprise may be a “partnership, corporation, association,” or any “other legal entity.”<sup>456</sup> The application of the *Reves* “operation or management” test to these traditional legal entities should be straightforward for three reasons. First, these business associations are common in the law and their treatment in a number of other legal contexts is already well-developed. Second, nearly every conceivable business entity or related association is found to be an enterprise under

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451. 18 U.S.C. § 1961(4) (1994). 18 U.S.C. § 1961(4) is an ostensive or a partial denotative definition; it is not connotative; its list of “enterprises” is illustrative, not exhaustive. *United States v. Masters*, 924 F.2d 1362, 1366 (7th Cir.) (includes a group of individuals, a law firm and two police departments), *cert. denied*, 500 U.S. 919 (1991). See *Helvering v. Morgan’s Inc.*, 193 U.S. 121, 125 n.1 (1934) (“means” and “includes” distinguished); see also *Turkette*, 452 U.S. at 580 (“no restriction upon the associations embraced”).

452. See, e.g., *Agency Holding*, 483 U.S. at 145 (holding Canadian corporation to be enterprise).

453. The concept of an association in fact in RICO turns out to be one of the least well-understood issues in RICO. It merits extended discussion. See generally APPENDIX G (ASSOCIATION IN FACT).

454. 452 U.S. 576 (1981).

455. *Id.* at 580-81.

456. 18 U.S.C. § 1961(4) (1994).

RICO.<sup>457</sup> Last, a number of other legal areas, including federal labor law and the criminal sentencing guidelines, utilize similar concepts that can be easily imported into RICO to give positive meaning to the *Reves* "operation or management" test for purposes of § 1962(c) liability.

### 1. Corporations

In the context of a corporation, the concept of management should depend on the size of the entity and its functions.<sup>458</sup> Provisions of the National Labor

457. See, *United States v. Beasley*, 72 F.3d 1518, 1525 (11th Cir. 1996) (stating that

Substantial legal precedent permits a wide range of legitimate enterprises to be named as a vehicle through which racketeering acts are committed. . . . A variety of entities can be enterprises, including benevolent and non profit organizations such as unions and benefit funds, governmental unit courts and judicial offices, police departments, and motorcycle clubs. . .).

See generally *Sedima*, 473 U.S. at 483-84 (RICO action brought against joint commercial venture); *United States v. Local 30*, 871 F.2d 401, 404 (3d Cir.) (labor union), *cert. denied*, 493 U.S. 953 (1989); *Beauford v. Helmsley*, 865 F.2d 1386, 1388 (2d Cir.) (partnership), *vacated*, 492 U.S. 914, and *cert. denied*, 493 U.S. 992 (1989); *McCullough*, 757 F.2d at 144 (sole proprietorship); *United States v. Jannotti*, 729 F.2d 213, 226 (3d Cir.) (law firm), *cert. denied*, 469 U.S. 880 (1984); *Computer Sciences Corp.*, 689 F.2d at 1190 (corporate division); *Bledsoe*, 674 F.2d at 660 (agricultural cooperative); *United States v. Weatherspoon*, 581 F.2d 595, 597-98 (7th Cir. 1978) (vocational school); *United States v. Parness*, 503 F.2d 430, 438-39 (2d Cir. 1974) (foreign corporation), *cert. denied*, 419 U.S. 1105 (1975); *Norris v. Wirtz*, 703 F. Supp. 1322, 1329 (N.D. Ill. 1989) (estate); *State Farm Mut. Auto. Ins. Co. v. Rosenfield*, 683 F. Supp. 106, 109 (E.D. Pa. 1988) (professional corporation); *John C. Holland Enters. v. J.P. Mascaro & Sons*, 653 F. Supp. 1242, 1249 (E.D. Va.) (corporation), *aff'd*, 829 F.2d 1120 (4th Cir. 1987); *First Fed. Sav. & Loan Ass'n*, 629 F. Supp. at 431-32, 446 (accounting firm).

458. A corporation is "an artificial person or legal entity created by or under the authority of the laws of a state." BLACK'S LAW DICTIONARY 340 (6th ed. 1990). A few states have adopted the Model Business Corporation Act [hereinafter "MBCA"]. See *Selected Corporation and Partnership Statutes 7 et seq.* (Lewis D. Solomon *et al.* eds. 1993); see also ARK. CODE ANN. §§ 4-27-120 to 4-27-1706 (Michie 1991 & Supp. 1993); GA. CODE ANN. §§ 14-2-101 to 14-2-1703 (1994 & Supp. 1995); 805 ILL. ANN. STAT ch. 5, para. 1.01 to 17.05 (Smith-Hurd 1993 & Supp. 1994); MINN. STAT. ANN. §§ 302A.011 to 302A.917 (West 1985 & Supp. 1994); TENN. CODE ANN. §§ 48-11-101 to 48-27-103 (1988 & Supp. 1994); VT. STAT. ANN. tit. 11, § 29B.900.050 (1994). Most of the remaining states have enacted corporation statutes or codes containing some provisions which are similar to those within the MBCA. See ALA. CODE §§ 10-2A-1 to 20-2A-339 (1987 & Supp. 1994); ALASKA STAT. §§ 10.06-005 to 10.06-995 (1989 & Supp. 1994); ARIZ. REV. STAT. ANN. §§ 10-002 to 10-509 (1990 & Supp. 1994); CAL. CORP. CODE §§ 100 *et seq.* (West 1990 & Supp. 1994); COLO. REV. STAT. ANN. §§ 7-1-101 to 7-10-113 (West 1990 & Supp. 1994); CONN. GEN. STAT. ANN. §§ 33-282 to 33-418 (West 1987 & Supp. 1994); DEL. CODE ANN. tit. 8, § 101-398 (1991 & Supp. 1992); FLA. STAT. ANN. §§ 607.0102 to 607.1622 (West 1993 & Supp. 1994); HAW. REV. STAT. §§ 415-1 to 415-172 (1993 & Supp. 1994); IDAHO CODE §§ 30-1-1 to 30-1-152 (1980 & Supp. 1994); IND. CODE ANN. §§ 23-1-17-1 to 23-1-54-3 (Burns 1989 & Supp. 1994); IOWA CODE ANN. §§ 490.101 to 490.1705 (West 1991 & Supp. 1994); KAN. STAT. ANN. §§ 17-601 to 17-631 (1988); KY. REV. STAT. ANN. §§ 27B.1-010 to 2-612 (Baldwin 1993 & Supp. 1994); ME. REV. STAT. ANN. tit. 13, § 41-817 (West 1981 & Supp. 1994); MASS. GEN. LAWS ANN. ch. 156, §§ 1 to 55 (West 1979 & Supp. 1994); MICH. COMP. LAWS ANN. §§ 450.1101 to 450.2098 (West 1990 & Supp. 1994); MISS. CODE ANN. §§ 79-4-1.01 *et seq.* (1989 & Supp. 1992); MO. ANN. STAT. §§ 351.010 to 351.525 (Vernon 1991 & Supp. 1994); MONT. CODE ANN. §§ 35-1-112 to 35-1-1312 (1993); NEB. REV. STAT. §§ 21-2001 to 21-20147 (1991); NEV. REV. STAT. ANN. §§ 78.010 to 78.785 (Michie 1994); N.H. REV. STAT. ANN. §§ 293-A:1 to 293-A:170 (1987 & Supp. 1993); N.J. STAT. ANN. §§ 14A:1-1 to 14A:16-4 (West 1969 & Supp. 1994); N.M. STAT. ANN. § 53-11-1 to 53-18-12 (Michie 1983 & Supp. 1994); N.Y. BUS. CORP. LAW §§ 101 *et seq.* (McKinney 1986 & Supp. 1995); N.C. GEN. STAT. §§ 55-1-20 to 55-17-05 (Supp. 1994); N.D. CENT. CODE §§ 10-19.1-01 to 10-19.1-131 (1985 & Supp. 1993); OHIO REV. CODE ANN. §§ 701.01 to 1701.99



Relations Act ("NLRA") address who is a managerial employee,<sup>459</sup> and the National Labor Relations Board's customary definition finds employees to be managers if they "formulate and effectuate management policies by expressing and making operative the decisions of their employer."<sup>460</sup> Thus, under the NLRA, in the context of a manufacturing corporation, management requires the making of policy or exercising discretion under an established policy.<sup>461</sup> Under RICO, too, a corporation may be vicariously liable under § 1962(c) for the actions of its employees or agents as long as the imposition of employees' or agents' liability does not violate the person/enterprise "distinctiveness" requirement.<sup>462</sup> Vicarious

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(Anderson 1992 & Supp. 1993); OKLA. STAT. ANN. tit. 18, § 1001-1143 (West 1986 & Supp. 1995); OR. REV. STAT. §§ 60.001 to 60.674 (1988 & Supp. 1994); 15 PA. CONS. STAT. ANN. §§ 1001 *et seq.* (1967 & Supp. 1994); R.I. GEN. LAWS §§ 7-1.1-1 to 7-1.1-141 (1992 & Supp. 1994); S.C. CODE ANN. §§ 33-1-101 to 33-14-400 (Law. Co-op. 1990 & Supp. 1993); S.D. CODIFIED LAWS ANN. §§ 47-7-1 to 47-7-51 (1991 & Supp. 1994); TEX. BUS. CORP. ACT. ANN. art. 1.01 *et seq.* (West 1980 & Supp. 1995); UTAH CODE ANN. §§ 16-10-1 to 16-10-148 (1991 & Supp. 1994); VA. CODE ANN. §§ 31.1-601 to 13.1-780 (Michie 1993 & Supp. 1994); W. VA. CODE §§ 31-1-1 to 31-1-135 (1988 & Supp. 1994); WIS. STAT. ANN. §§ 180.0101 to 180.1440 (West 1992 & Supp. 1994); WYO. STAT. §§ 17-16-101 to 17-16-1803 (1989 & Supp. 1994). Generally, articles of incorporation must be prepared and filed with the Secretary of State. Pursuant to the MBCA, the articles of incorporation must specify (1) the name of the corporation; (2) the number of shares the corporation is authorized to issue; (3) the street address of the corporation's initial registered office and the name of its initial registered agent at that office; and (4) the name and address of each incorporator. MBCA at 15. Some state corporation statutes do not contain mandatory content requirements for the articles of incorporation. *See, e.g.,* CAL. CORP. CODE § 204 (West 1990 & Supp. 1994). The use of articles of incorporation to prove the existence of an enterprise is straightforward. *See, e.g.,* United States v. Weisman, 624 F.2d 1118, 1125 (2d Cir.) (holding evidence sufficient that a theater, the enterprise, was in existence prior to the commencement of the securities fraud scheme because "after its incorporation in 1971, the Theater adopted bylaws, secured counsel and hired employees, established offices, sought a construction loan, entered negotiations with a real estate firm for a construction site, and began entering performance contracts with various entertainers."), *cert. denied*, 449 U.S. 871 (1980).

459. *See* 29 U.S.C. § 152 (1994).

460. Palace Laundry Dry Cleaning Corp., 75 N.L.R.B. 320, 323 n.4 (1947).

461. For example, in *NLRB v. Bell Aerospace Co. Div.*, 416 U.S. 267 (1974), the Supreme Court discussed what it meant to be a managerial employee in a case involving a manufacturing corporation in which the employees in charge of buying items necessary for manufacturing the corporation's products wished to form a collective bargaining unit. The Court cited with approval the National Labor Relations Board's customary definition that employees are managerial when they "formulate and effectuate management policies by expressing and making operative the decisions of their employer." *Id.* at 288 (quoting *Palace Laundry*, 75 N.L.R.B. at 323 n.4).

462. The standards for the vicarious liability (respondeat superior, ratification, aiding and abetting and conspiracy) of an entity under RICO are comprehensively reviewed in *Cox*, 17 F.3d at 1404-11. *See also* Davis v. Mutual Life Ins. Co., 6 F.3d 367, 379 (6th Cir. 1993) (holding respondeat superior), *cert. denied*, 114 S. Ct. 1298 (1994); Brady v. Dairy Fresh Prods. Co., 974 F.2d 1149, 1153-54 (9th Cir. 1992) (same); *Landry*, 901 F.2d at 425 (same); D & S Auto Parts v. Schwartz, 838 F.2d 964, 966-68 (7th Cir.) (same; applicable test is the intent to benefit), *cert. denied*, 486 U.S. 1061 (1988); *Liquid Air Corp.*, 834 F.2d at 1307 (same; applicable test is a benefit to the principal); *Petro-Tech*, 824 F.2d at 1360-61 (same). Unfortunately, these decisions reflect some of the same sort of confusion found in the accomplice area. Remarkably, *Davis*, *Brady*, and *Petro-Tech* considered the issue wholly apart from the general jurisprudence under Title 18, though the proper result was obtained in each case. In short, the decisions do not make clear the relationship between general civil theories of secondary responsibility and criminal theories of responsibility under RICO. This area of the law requires rethinking and rationalization in light of general policy. For different perspectives compare G. Robert Blakey, *Foreward: Debunking RICO's Myriad Myths*, 64 ST. JOHN'S L. REV. 701, 714, 718-19 (1990) with Philip A. Lacovara & David P. Nicoli, *Vicarious Criminal Liability of Organizations RICO As An Example of a Flawed Principle in Practice*, *id.* at 725.

liability may be imposed either when the corporation's agent manages *or* operates the enterprise with the appropriate state of mind.<sup>463</sup>

While liability under the *Reves* test "is *not* limited to upper management,"<sup>464</sup> liability under some state "little RICO" statutes is limited to upper management.<sup>465</sup> Cases decided under these statutes point to who is *definitively* within the scope of the *Reves* test, and general managers and vice-presidents are quickly found to fit under these statutes.<sup>466</sup> A similar result ought to obtain—and in some cases it already has—under *Reves*.<sup>467</sup>

Section 2.07(1)(c) of the Model Penal Code follows a similar analysis, when it

See also Blakey *supra* note 3, at 290 n.151 (comprehensive review of various theories of individual and entity liability in civil and criminal jurisprudence). The principal objection to Lacovara and Nicoli's effort to impose the "high managerial agent" theory of the Model Penal Code upon entity liability under RICO is Article III of the U.S. Constitution.

In 1948, Congress codified entity liability. See 1 U.S.C. § 1 (defining "whoever" and "person" throughout the United States Code to include entities); S. REP. NO. 80-1020 at 5 (1948); H.R. REP. NO. 80-304 at 8 (1947) ("preserve the original meaning"). That meaning is reflected in various Supreme Court decisions. See, e.g., *New York C. R.R. & H. R. R.R.*, 212 U.S. at 495 (criminal); *Denver & Rio Grande Ry. v. Harris*, 122 U.S. 597, 608 (1887) (civil liability for assault) (Harlan, J.); *Salt Lake City v. Hollister*, 118 U.S. 256, 261 (1885) (tax case). Congress, too, mandated that form of liability, at least since the Dictionary Act, 16 Stat. 431 (1871), if not well before then. In fact, the Supreme Court construed "person" to include "corporation" for purposes of criminal liability as early as 1909. See *United States v. Union Supply Co.*, 215 U.S. 50, 54 (1909) (Holmes, J.); *New York C. & H. R. R.R.*, 212 U.S. at 495. Any ambiguity in the scope of the Dictionary Act was clarified in the Revised Statutes of 1874. REV. STAT. § 1 (1874). The Dictionary Act's definitions are mandatory, not permissive. *Monell v. Department of Social Servs.*, 436 U.S. 658, 689 n.53 (1978). Entity liability without regard for the high managerial status of the agent or employees is, therefore, firmly fixed in federal law. See, e.g., *Dotterweich*, 320 U.S. at 285; Kathleen F. Brickey, *Rethinking Corporate Liability Under The Model Penal Code*, 19 RUTGERS L.J. 593, 612 (1988) ("[A] considerable body of federal case law support[s] the proposition that a corporation . . . [can] be held to account for criminal acts performed by officers and agents in the course of employment, without regard to their status in the corporate hierarchy."); see also LaBrun, *supra* note 3, at 188 n.62 (not federal or general rule), at 205 (discussing of rule and pertinent RICO decisions). Thus, any change, if change is to come, is a matter for Congress, not the courts.

463. *Davis*, 6 F.3d at 380. In *Davis*, the Mutual Life Insurance Company of New York ("MONY") encouraged a salesman who owned his own insurance agency (FIA) to sell its policies in conjunction with a fraudulent tax shelter scheme. The Sixth Circuit found that the salesman's action could be imputed to MONY. *Id.* Because the salesman operated and managed the RICO enterprise (FIA) the *Reves* test was also met as to the salesman. *Id.* Because the salesman's acts could be attributed to MONY, the Sixth Circuit thought "it appropriate to attribute to MONY [the salesman's] role within the RICO enterprise." *Id.*

464. *Reves*, 507 U.S. at 184 (emphasis added).

465. For example, under Utah's RICO statute, a corporation is only liable for double damages if "a high managerial agent acting within the scope of his employment," conducts the affairs of the corporation through a "pattern of unlawful activity." UTAH CODE ANN. § 76-10-1605(4) (1981).

466. In *Atla Indus., v. Hurst*, 846 P.2d 1282 (Utah 1993), a civil case decided under Utah's "little RICO" statute, the Utah Supreme Court found that the vice-president and general manager of Wasatch Steel conducted a pattern of unlawful activity within the scope of his employment as a high managerial agent. Hurst was engaged in paying bribes to managers at Atla Industries so they would then buy steel at inflated prices from Wasatch. *Id.* at 1284. Hurst also purchased steel he knew was stolen from Atla by its employees to resell to Atla. *Id.* The Utah court found Hurst to be a high managerial agent and, therefore, subject to RICO liability. *Id.* at 1289.

467. Compare *Schrag v. Dinges*, 150 F.R.D. 664, 670 (D. Kan. 1993) (under *Reves*, a bank director is a manager of the bank; a bank officer is a manager, and a director of a corporation is also a manager), *aff'd*, 73 F.3d 374 (10th Cir. 1995), with *Quick v. Peoples Bank*, 993 F.2d 793, 797-98 (11th Cir. 1993) (decided prior to *Reves*; holding bank liable for wrongful actions of loan officers).

makes a corporation liable if its high managerial agents act criminally or if they recklessly tolerate a crime.<sup>468</sup> The code defines the term "high managerial agent" to mean:

an officer of a corporation or an unincorporated association, or, in the case of a partnership, a partner, or any other agent of a corporation or association having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association.<sup>469</sup>

Thus, high managerial agents should fall within the *Reves* "operation or management" test.<sup>470</sup>

In a service industry, where companies maintain physically separate branch offices, concepts developed under the Fair Labor Standards Act (FLSA) to distinguish executives from workers could also be usefully imported to provide meaning to the *Reves* test. To be found to be an executive under the FLSA, a person must have managing as his or her primary duty.<sup>471</sup> Courts construing the statute note that to possess management as a "primary duty," a person need not *exclusively* manage; indeed, he or she might manage even while engaged in nonmanagerial tasks.<sup>472</sup> Where an employee is "in charge" of the business

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468. MODEL PENAL CODE § 2.07(1)(c) (1962). See, *infra* note 925 (discussion of Model Penal Code).

469. MODEL PENAL CODE § 2.07(4)(c) (1962).

470. For example, in *People v. Deitsch*, 470 N.Y.S.2d 158 (A.D. Dep't 1983), the Appellate Division of the New York Supreme Court addressed whether certain employees were high managerial agents. The Court was required to determine if the evidence was sufficient to hold the defendant textile manufacturer criminally liable for the death of an employee at a fire in the company's warehouse under a criminal statute based on the Model Penal Code. *Id.* at 163. To hold the corporation liable, the statute required that the three individual defendants be high managerial agents. Zalman Deitsch was president of the company and Joseph Deitsch, his brother, was second-in-command. *Id.* Baruch Scher was the warehouse foreman who was in charge of supervising the day-to-day activities of the workers at the warehouse where the employee was killed. *Id.* The court found all three men, including the warehouse foreman, to be high managerial agents. The New York court's finding is unremarkable as to the president and second-in-command. Obviously, the chief executive officer of a corporation and the officers immediately beneath him are high managerial agents who are involved in managing and operating the business. The Court's finding that the foreman was also a high managerial agent is more interesting because it coincides with the concept that the man in charge of any physically separate branch of a corporation is necessarily involved in its management. In *Deitsch*, the foreman was in charge of all of the daily activities at the warehouse; thus, he was properly found to be managing this aspect of the company. Similarly, in *People v. Guido*, 518 N.Y.S.2d 188 (A.D. Dep't 1987), the Appellate Division of the New York Supreme Court held a company criminally liable for filing a false instrument based on the fact that the foreman was a high managerial agent. This case sets a standard that could also be used in applying the *Reves* test. Certainly, high managerial agents are involved in the management or operation of a corporation. The decision in *Commonwealth v. J.F. Lomma, Inc.*, 590 A.2d 342 (Pa. Super. Ct. 1991), offers an instructive counter-example because the Pennsylvania Superior Court held that truck drivers who were hauling illegally heavy loads were *not* high managerial agents. *Id.* at 346.

471. See, e. g., *Banks v. Cohen*, No. 89-7219, 1993 U.S. Dist. LEXIS 11083 (E.D. Pa. Aug. 11, 1993) (finding that, as vice-president of enterprise, defendant participated in the affairs of the company/enterprise). In *Donovan v. Burger King Corp.*, 672 F.2d 221 (1st Cir. 1982), the First Circuit found that the assistant managers at Burger King's company-owned stores "were 'employed in a bona fide executive . . . capacity.'" *Id.* at 223 (quoting 29 U.S.C. § 213(a)(1)). The Court held that the assistant managers supervised other employees and ensured that company policies were carried out. *Donovan*, 672 F.2d at 226.

472. *Id.*

establishment, the employee is also *de facto* primarily involved in its management.<sup>473</sup> Similarly, courts note “well-reasoned support for the proposition that the person ‘in charge’ of a store has management as his primary duty, even though he spends the majority of his time on non-exempt work and makes few significant decisions.”<sup>474</sup> Thus, an individual who is in charge of a branch office of a corporation involved in providing a service—whether it is a restaurant or a broker-dealer firm in the securities investment business—is considered to be managing the affairs of the branch office. This well-reasoned concept of what it means to manage should be utilized in cases applying the *Reves* test.<sup>475</sup>

In the context of a transportation corporation, guidance as to what constitutes management may be found under 18 U.S.C. § 660, which makes it a federal offense for a “manager” to embezzle from a common carrier involved in interstate commerce.<sup>476</sup> In *United States v. Marino*,<sup>477</sup> the Second Circuit concluded that the defendant was a manager because he reported to the chief executive of the company.<sup>478</sup> Moreover, the court concluded that anyone capable of operating a fraudulent scheme from his position in a corporation must be considered to be involved in the management or operation of that entity.<sup>479</sup> A similar argument could be employed by the lower federal courts to give substantial meaning to the *Reves* “operate or manage” test.

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473. *Id.* (citing *Rau v. Darling's Drug Store*, 388 F. Supp. 877 (W.D. Pa. 1975)).

474. *Id.* at 226-27.

475. *See, e.g., Smith v. City of Jackson*, 954 F.2d 296, 298-99 (5th Cir. 1992) (finding battalion and district fire chiefs to be administrative employees); *Murray v. Stuckey's, Inc.*, 939 F.2d 614, 620 (8th Cir. 1991) (holding managers of physically separate branches to be executive employees), *cert. denied*, 502 U.S. 1073 (1992); *Donovan*, 675 F.2d at 520 (holding assistant managers of fast-food restaurant to be executive employees).

476. The statute, in pertinent part, provides:

[W]hoever, being a president, director, officer, or manager of any firm, association, or corporation engaged in commerce as a common carrier . . . embezzles . . . any of the moneys . . . of such firm . . . to his own use or to the use of another, shall be fined not more than \$5,000 or imprisoned not more than ten years, or both.

18 U.S.C. § 660 (1994).

477. 639 F.2d 882 (2d Cir.), *cert. denied*, 454 U.S. 825 (1981).

478. The defendant argued on appeal that the government did not show that one of his co-conspirators was a manager of the common carrier, an element necessary to prove the defendant's guilt. The defendant was the owner of Marine Repair Services (Marine Repair), and he developed a kickback scheme with Keith Nelson and John Marano, two executives of the common carrier, Prudential Grace Lines, Inc. Prudential used Marine Repair to service its containers and the executives (and a union official) each received a kickback from Marine Repair. The Second Circuit rejected defendant's argument, holding that “[a]t trial Nelson [the co-conspirator whose managerial status was in question] was shown to have been an executive of some importance . . . at the time of the fraud.” *Id.* at 888. The court noted that Nelson “supervised a staff of about twenty-five people and was responsible for the use and maintenance of all of Prudential's containers and related trucking and stevedoring equipment.” *Id.* Further, “he reported directly to Marano who reported in turn to the president of the company.” *Id.* Thus, he was held to be a manager under § 660. *Id.*

479. The Second Circuit noted, “above all, Nelson's role in carrying out the fraud shows him to have been an individual exercising ‘a great deal of control.’ ” 639 F.2d at 888 (quoting *United States v. Gregg*, 612 F.2d 43, 49 (2d Cir. 1979)).

## 2. Professional Groups

In the context of professional groups, courts find that under the NLRA, employees "that . . . were so closely aligned with the . . . management in the formulation, determination, and effectuation, not to mention expression, of the . . . management's policies" are management.<sup>480</sup> This analysis, which finds editorial writers at a newspaper to be managerial employees, should apply equally to other media, such as magazines, radio, and television, and advertising firms.<sup>481</sup> The reasoning could also be applied to public relations firms or consultants working with or within corporations because, to the extent that they participate in generating or slanting information about a company, they can be said to have operated or managed the company.

Applying these principles, distilled from cases decided under the federal labor laws, accountants, lawyers, consultants, and other professionals should be treated no differently for purposes of RICO liability. For substantive RICO liability to attach under § 1962(c), the professional must be implicated in the racketeering activity. After *Reves* an additional element that must be met, for liability to attach as a principal in the first degree, is that the professional be implicated in the racketeering activity as an operator or manager of the affairs of the enterprise—depending, of course, on how the enterprise is identified in the pleadings.

Factors developed in determining *who* is a manager of a business in labor cases also translate well into the *Reves* test for § 1962(c) liability. These factors include control of the methods of practice, hiring, pricing, and location. Thus, in a professional corporation or partnership that is run through various committees, those persons who have a say in the setting of the prices and the type of services provided *manage* the enterprise. Committee members who control the hiring of employees and help plan expansions and mergers are also involved in the management of the firm.<sup>482</sup>

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480. *Wichita Eagle & Beacon Publishing Co. v. NLRB*, 480 F.2d 52, 56 (10th Cir. 1973), *cert. denied*, 416 U.S. 982 (1974).

481. What is necessary for an employee to be involved in the management or operation of a newspaper was discussed in *Wichita Eagle*, where the Tenth Circuit considered whether editorial writers were managerial employees for purposes of the NLRA, which was enacted to deal with the "inequality of bargaining power between employees . . . and employers." 29 U.S.C. § 151. Generally, the statute is read to exclude managerial employees from the collective bargaining unit because their views might be so favorable to the employer as to unfairly bias the workers. The court found that the writers were managerial employees because they were involved in generating, slanting and writing the newspaper's editorials, although their opinions could be vetoed by the editors or the owners of the paper at their daily conference. *Wichita Eagle*, 480 F.2d at 54. In addition, while the writers did not possess power over the fiscal management of the paper, the Tenth Circuit still held that their roles were managerial. *Id.* at 56.

482. This was established in *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980), where the Supreme Court held that the university professors were managerial employees. *Id.* at 691-92. The faculty at Yeshiva possessed substantial control in determining teaching and grading methods, class sizes and matriculation. *Id.* at 686. Occasionally, acting through committees, the faculty controlled the amount of tuition to be charged and the school's location. *Id.* The Court noted that "[w]hen one considers the function of a university, it is difficult to imagine decisions more

In the areas of dealing, brokering, and selling securities, any person who could be found to be a "controlling person" for secondary liability under § 15 of the Securities Act of 1933<sup>483</sup> or § 20 of the Securities Exchange Act of 1934<sup>484</sup> should also to be held to be involved in the "operation or management" of the enterprise that he or she controlled. Unfortunately, if a modern Augean Stables exists, the jurisprudence of the control person provisions of the securities statutes fits the label.<sup>485</sup> If the courts were to venture into the perplexing field of the securities laws seeking analogies to give meaning to the *Reves* test, RICO's Liberal Construction Clause means that the broader interpretations of the control person principle should be adopted.<sup>486</sup> Translated into the *Reves* test, the "control person" is one who *manages* the enterprise. When that person is, for example, found liable under the federal securities laws for allowing his employees in a brokerage house to defraud investors, the person ought to be considered a "manager" conducting the affairs of the brokerage house through a pattern of racketeering activity.

### 3. *Financiers*

Financiers should be considered managers when they possess the power to direct the enterprise or when they possess the financial leverage necessary to force the enterprise to halt (or continue) its racketeering activity. Thus, to find that a financier is involved in the operation or management of an enterprise, the court

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managerial than these." *Id.* The same factors used to find that the professors in *Yeshiva* were managerial employees could be used to test any professional group's liability under *Reves*.

483. 15 U.S.C. § 77 (1994). See *infra* APPENDIX I (SECURITIES FRAUD REFORM).

484. 15 U.S.C. § 78t (1994). See *infra* APPENDIX I (SECURITIES FRAUD REFORM).

485. A split in authority exists in the circuits on the level of "culpability necessary to impose liability on controlling persons." HAROLD BLUMENTHAL, *SECURITIES LAW HANDBOOK*, § 14.12, at 14-54 (1993). See, e.g., *G.A. Thompson & Co. v. Partridge*, 636 F.2d 945, 960 (5th Cir. 1981) After the Supreme Court mentioned in dictum that § 20(a) of the Exchange Act "contains a state-of-mind condition requiring something more than negligence," *Ernst & Ernst*, 425 U.S. at 209 n.28, the Fifth Circuit held that a recklessness standard is appropriate. Thus, in the Fifth Circuit a person may be responsible if he fails to supervise his employees, while in the Second Circuit he or she must actually participate in the scheme. These decisions cannot be reconciled.; *Lanza*, 479 F.2d at 1299 (The Second Circuit holds that only controlling persons "who are in some meaningful sense culpable participants in the fraud perpetrated" can be held liable.); *Bradshaw v. Van Houten*, 601 F. Supp. 983, 985 (D. Ariz. 1985) ("At first blush, the Ninth Circuit decisions on controlling person liability seem to be contradictory."); *Sharp v. Coopers & Lybrand*, 457 F. Supp. 879, 893 (E.D. Pa. 1978), *aff'd*, 649 F.2d 175 (3d Cir. 1981), *cert. denied*, 445 U.S. 938 (1982) ("[T]he Third Circuit case law construing [controlling person liability] . . . is at best ambiguous and at worst a mess.").

486. For example, in *Martin v. Shearson Lehman Hutton*, 986 F.2d 242 (8th Cir.), *cert. denied*, 114 S. Ct. 177 (1993), the Eighth Circuit held that a brokerage house was liable for the wrongful actions of one of its brokers where the plaintiff bought stock and one of the defendant's employees represented "the stock as a safe investment with a secure dividend." *Id.* at 243. This recommendation to buy the stock came "despite the fact that Shearson management had instructed its brokers to halt recommendations for" the stock. *Id.* at 244. When the stock soon became worthless the plaintiff sued, contending that the brokerage house was a control person liable for the broker's fraudulent misrepresentations, the Eighth Circuit agreed, stating: "[w]e have held that the statute reaches persons who have only 'some indirect means of discipline or influence' less than actual direction." *Id.* (citations omitted). Thus, because the brokerage house possessed the ability to discipline and influence the salesman it was a control person.

should apply a two-part test: first, it should determine whether the financier knew of the racketeering activity and intended to promote it; and second, it should determine whether the financier possessed the leverage necessary to effect a change in the operation of the enterprise.<sup>487</sup> Accordingly, an individual who knew that an enterprise was engaged in racketeering and possessed the power to stop it, but did not, and profited from its continuation, should be considered to be operating and managing the enterprise and should be liable under § 1962(c).<sup>488</sup>

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487. The First Circuit's decision in *United States v. Cronin*, 990 F.2d 663 (1st Cir. 1993), which was decided under the Sentencing Guidelines, exemplifies the position of financiers within management. The Sentencing Guidelines provide that managers or supervisors of a criminal enterprise should be given harsher sentences than individuals who are merely pawns of the enterprise. U.S. SENTENCING GUIDELINES MANUAL § 3B1.1 (1995). The concepts developed by the First Circuit in *Cronin* are applicable to any business association where the financiers possess knowledge of the enterprise and some control over its operation through their financial leverage. *Cronin*, Starck, and Mendell were convicted of mail fraud and inducing interstate transportation to obtain property by fraud. *Cronin* was found to be the leader/organizer, and Starck and Mendell were found to be managers. They defrauded a number of people through the selling of time share investments in Village Green, a proposed Cape Cod resort. *Id.* at 664. While defendants made many misrepresentations, "the basic ones were that Village Green was a sound long-term investment; that its property, then a motel, would be renovated for the 1989 season; and that [Village Green] was a member of RCI, Resort Condominium International, Inc." *Id.* If Village Green were a member of RCI its investors would be able to trade vacation time at Village Green for time at other resorts around the world. *Id.* Village Green possessed no financing, had no money available for renovations and was not a member of RCI, although it had submitted an application. *Id.* Defendants collected \$272,000 from investors, apparently in hopes of using the money to turn the corner and begin the renovations. *Id.* *Cronin* argued on appeal that he was not a leader or organizer, but rather, merely a dupe of unscrupulous salespeople. *Id.* The First Circuit disagreed, noting that "Cronin was the originator of the development," *id.*, emphasizing that he also attempted to secure financing and did, in fact, obtain some. *Id.* at 664-65. The Project Director reported to Cronin, and Cronin, who was in charge of marketing, was present at the office every day. *Id.* at 665. He was also able to use his influence to embezzle money by creating fictitious jobs, which he would then fill with dead friends, with their salaries actually being paid to him. *Id.* The First Circuit concluded that Cronin was amply shown to be a leader or organizer of the enterprise. *Id.* Because being a leader or organizer is higher on the hierarchical ladder than a manager or supervisor, Cronin would clearly meet *Reves*' "operation or management" test.

Starck and Mendell were trustees of the venture and personally endorsed the purchase note. *Id.* These defendants argued on appeal that they were not managers of the enterprise because they were not its original organizers. *Id.* The court emphasized that "they cannot deny responsibility for deliberate misrepresentation by salesmen of which they were aware, even to the point of receiving complaints, simply on the ground that they were not the ones who devised the procedure." *Id.* The First Circuit concluded that if Starck and Mendell were not found to be managers, "[t]his would be a happy day for vendors with loose consciences. The record is replete with misrepresentations, and of defendants', at least occasional, awareness and lack of concern." *Id.* This reasoning—that defendants were "managers" because they were financiers who were aware that the salesmen were defrauding would-be buyers—is easily imported into the "operation or management" test for § 1962(c) liability under *Reves*.

488. In *Quick*, a pre-*Reves* civil RICO case involving a financial institution, the Eleventh Circuit addressed whether a bank's assistant vice president was sufficiently involved in management to make the bank liable for his wrongdoing under *respondeat superior*. The Court did not conceptualize the issue as if it were a *Reves* problem, but the result under *Reves* would be no different. The Court observed, "the Bank had one president, two vice presidents, and four or five assistant vice presidents. Buckelew was, thus, one of the top seven or eight officers in an organization that had forty-five to fifty employees." *Id.* at 798. The Eleventh Circuit concluded that Buckelew held a sufficiently high position to impose liability on the bank and stated that "regardless of whether Buckelew should be considered an upper-level employee, the jury was entitled to infer that the Bank's upper management later acquiesced in Buckelew's activities." *Id.*

#### 4. Partnerships

When the RICO enterprise is a partnership, the *Reves* test should be easier to satisfy because partnership law traditionally makes each partner liable for the acts of every other partner.<sup>489</sup> The Uniform Partnership Act, which is the law in over 40

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489. The business community recognizes two forms of partnerships: general and limited partnerships. A general partnership is defined as "an association of two or more persons to carry on as co-owners a business for profit." SELECTED CORPORATION AND PARTNERSHIP STATUTES, RULES, AND FORMS 607 (Lewis D. Solomon et al. eds., 1993). Because the definition specifies that such a partnership is an "association," individuals need not create either a contract or a formal writing to establish a general partnership. Rather, a general partnership may be formed through an oral agreement. Most states have adopted the Uniform Partnership Act. See ALA. CODE §§ 10-8-1 to 10-8-103 (1994 & Supp. 1995); ALASKA STAT. §§ 32.05.010 to 32.05.430 (1993 & Supp. 1995); ARIZ. REV. STAT. ANN. §§ 29-201 to 29-270 (1989 & Supp. 1995); ARK. CODE ANN. §§ 4-42-101 to 4-42-702 (Michie 1991 & Supp. 1993); CAL. CORP. CODE §§ 15001 to 15046 (West 1991 & Supp. 1994); COLO. REV. STAT. ANN. §§ 7-60-101 to 7-60-154 (West 1990 & Supp. 1995); CONN. GEN. STAT. ANN. §§ 34-39 to 34-81z (West 1987 & Supp. 1995); DEL. CODE ANN. tit. 6, §§ 1501 to 1553 (1993 & Supp. 1994); FLA. STAT. ANN. §§ 620.56 to 620.77 (West 1993); GA. CODE ANN. §§ 14-8-1 to 14-8-64 (1994 & Supp. 1995); HAW. REV. STAT. §§ 425-101 to 425-143 (1993 & Supp. 1995); IDAHO CODE §§ 53-301 to 53-343C (1994); 805 ILL. ANN. STAT. ch. 205, paras. 1 to 43 (Smith-Hurd 1993 & Supp. 1995); IND. CODE ANN. §§ 23-4-1-1 to 23-4-1-52 (Burns 1989 & Supp. 1995); IOWA CODE ANN. §§ 486.1 to 486.46 (West 1987 & Supp. 1995); KAN. STAT. ANN. §§ 56-301 to 56-347 (1994 & Supp. 1995); KY. REV. STAT. ANN. §§ 362.150 to 362.360 (Baldwin 1993 & Supp. 1995); ME. REV. STAT. ANN. tit. 31, § 281-323 (West 1978 & Supp. 1995); MD. CODE ANN., CORPS. & ASS'NS §§ 9-101 to 9-912 (1993 & Supp. 1995); MASS. GEN. LAWS ANN. ch. 108A, §§ 1 to 44 (West 1990 & Supp. 1994); MICH. COMP. LAWS ANN. §§ 449.1 to 449.48 (West 1989 & Supp. 1995); MINN. STAT. ANN. §§ 323.01 to 323.49 (West 1995 & Supp. 1996); MISS. CODE ANN. §§ 79-12-1 to 79-12-119 (1989 & Supp. 1994); MO. ANN. STAT. §§ 358.010 to 358.510 (Vernon 1968 & Supp. 1996); MONT. CODE ANN. §§ 35-10-101 to 35-10-710 (1995); NEB. REV. STAT. §§ 67-301 to 67-343 (1990); NEV. REV. STAT. ANN. §§ 87.010 to 87.560 (Michie 1994 & Supp. 1995); N.H. REV. STAT. ANN. §§ 304-A:1 to 304-A:43 (1995); N.J. STAT. ANN. §§ 42:1-1 to 42:1-43 (West 1993 & Supp. 1995); N.M. STAT. ANN. §§ 54-1-1 to 54-1-48 (Michie 1988 & Supp. 1995); N.Y. PARTNERSHIP LAW §§ 1 to 74, 121-1500 to 121-1503 (McKinney 1988 & Supp. 1996); N.C. GEN. STAT. §§ 59-31 to 59-73 (1989 & Supp. 1995); N.D. CENT. CODE §§ 45-05-01 to 45-09-15, 45-12-04 (1993 & Supp. 1995); OHIO REV. CODE ANN. §§ 1775.01 to 1775.63 (Anderson 1992 & Supp. 1994); OKLA. STAT. ANN. tit. 54, §§ 201 to 243 (West 1991 & Supp. 1996); OR. REV. STAT. §§ 68.010 to 68.650 (1993 & Supp. 1994); 15 PA. CONS. STAT. ANN. §§ 8301 to 8365 (1995); R.I. GEN. LAWS §§ 7-12-12 to 7-12-55 (1992 & Supp. 1995); S.C. CODE ANN. §§ 33-41-10 to 33-41-1220 (Law. Co-op. 1990 & Supp. 1995); S.D. CODIFIED LAWS ANN. §§ 48-1-1 to 48-5-56 (1991 & Supp. 1995); TENN. CODE ANN. §§ 61-1-101 to 61-1-147 (1989 & Supp. 1995); TEX. REV. CIV. STAT. ANN. art. 6132b (West 1970 & Supp. 1996); UTAH CODE ANN. §§ 48-1-1 to 48-1-48 (1994 & Supp. 1995); VT. STAT. ANN. tit. 11, §§ 1121 to 1335 (1993); VA. CODE ANN. §§ 50-1 to 50-43.12 (Michie 1994 & Supp. 1995); WASH. REV. CODE ANN. §§ 25.04.010 to 25.04.430 (West 1994 & Supp. 1996); W. VA. CODE §§ 47B-1-1 to 47B-10-5 (Supp. 1995); WIS. STAT. ANN. §§ 178.01 to 178.39 (West 1989 & Supp. 1995); WYO. STAT. §§ 17-21-101 to 17-21-1003 (Supp. 1995). The Act sets forth specific rules for determining whether a general partnership, in fact, exists. One example of a rule specified within the Act is that a "[j]oint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property." PARTNERSHIP STATUTES, *supra* at 607. In addition, the Act specifies that receiving a share of the gross returns "does not of itself establish a partnership." *Id.* Nevertheless, "[t]he receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business." *Id.* Courts or other individuals may not make this inference where the person obtains the profits as payment for (a) debt by installment or otherwise; (b) wages of an employee or rent of a landlord; (c) an annuity to a widow or representative of a deceased partner; (d) interest on a loan, though the amount of payment vary with the profits of the business; (e) the consideration for the sale of a good-will of a business or other property by installments or otherwise. *Id.* Further, mere common ownership of partnership property or a common interest in the partnership does not, by itself, establish the existence of a partnership.



states, provides that:

Every partner is an agent of the partnership for the purpose of its business, and the act of every partner . . . for apparently carrying on in the usual way the

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In general, factors that courts may consider in determining whether a partnership exists include: (1) a written partnership agreement; (2) intent or agreement between the parties to become partners; (3) a showing that the parties share the profits and losses associated with the partnership; (4) a showing that the parties share in the management and/or workings of the partnership; and (5) the use of a firm name. *See, e.g., Beck v. Indiana Surveying Co.*, 429 N.E.2d 264, 268 (Ind. Ct. App. 1981) (partnership evidenced by use of firm name). In *Fed. Sav. & Loan Ins. Corp. v. Griffin*, 935 F.2d 691 (5th Cir. 1991), *cert. denied*, 502 U.S. 1092 (1992) the Fifth Circuit stated, "[t]he parties' intent is the most important test in determining whether a partnership is formed." *Id.* at 700. The court went on to determine that no partnership existed "[b]ecause the written documents reflect an intention not to form a partnership, because the parties agreed not to share profits, and because the assignment of profits is not evidence of an intent to form a partnership." *Id.* *See also* McAleer v. Smith, 728 F. Supp. 857, 861 (D.R.I. 1990) ("The continuation of a business by partners presents prima facie evidence that a partnership still exists."); *Beck*, 429 N.E.2d at 267 (receipt of profit share of business is prima facie evidence that individual receiving share is partner in business); *Miller v. City Bank & Trust Co.*, 266 N.W.2d 687, 689-91 (Mich. Ct. App. 1978) (intention, co-ownership of property, and profit-sharing are evidence that partnership exists); *Olson v. Smithtown Medical Specialists, P.C.*, 602 N.Y.S.2d 649, 650 (App. Div. 1993) (receipt of profit share from business is prima facie evidence that individual receiving share is partner and that partnership exists); *Gutierrez v. Yancey*, 650 S.W.2d 169, 171-72 (Tex. Ct. App. 1983) (parties' intent and parties' agreement to share profits are indicative of a partnership). *Cf. Cooper v. Spencer*, 238 S.E.2d 805, 806-07 (Va. 1977) (joint ownership of property and sharing of gross returns, although indicative of partnership, do not of themselves establish existence of partnership).

Dissolution of a partnership occurs when any partner disassociates himself from the activities of carrying on the business. In addition, the partnership dissolves when a partner dies, a partner goes bankrupt, circumstances exist making it impossible to carry on the partnership, or by court decree. *PARTNERSHIP STATUTES*, *supra* at 615; *see also Furman v. Cirrito*, 828 F.2d 898, 902-03 (2d Cir. 1987) (holding that continuity requirement for RICO enterprise was not satisfied because the partnership had dissolved), *overruled in part*, *United States v. Indelicato*, 865 F.2d 1370 (2d Cir. 1989), *cert denied*, 491 U.S. 907 (1989). The second type of partnership is a limited partnership. A limited partnership is defined as a partnership formed by two or more persons under the laws of its state and having one or more general partners and one or more limited partners. *PARTNERSHIP STATUTES*, *supra* at 661. Most states follow either the *UNIFORM LIMITED PARTNERSHIP ACT* [ULPA], *VT. STAT. ANN.* tit. 11, §§ 1391 to 1419 (1993) (ULPA) or the *Revised Uniform Limited Partnership Act* ["RULPA"]. *See ALA. CODE* §§ 10-9A-1 to 10-9A-203 (1994 & Supp. 1994); *ALASKA STAT.* §§ 32.11.010 to 32.11.990 (1993 & Supp. 1995); *ARIZ. REV. STAT. ANN.* §§ 29-301 to 29-366 (1989 & Supp. 1995); *ARK. CODE ANN.* §§ 4-43-101 to 4-43-1109 (Michie 1991 & Supp. 1993); *CAL. CORP. CODE* §§ 15611 to 15723 (West 1991 & Supp. 1996); *COLO. REV. STAT. ANN.* §§ 7-62-101 to 7-62-1201 (West 1990 & Supp. 1995); *CONN. GEN. STAT. ANN.* §§ 34-9 to 34-38r (West 1987 & Supp. 1995); *DEL. CODE ANN.* tit. 6, §§ 17-101 to 17-1109 (1993 & Supp. 1994); *FLA. STAT. ANN.* §§ 620.101 to 620.192 (West 1993 & Supp. 1996); *GA. CODE ANN.* §§ 14-9-100 to 14-9-1204 (Michie 1994); *HAW. REV. STAT.* §§ 425D-101 to 425D-1108 (1993 & Supp. 1995); *IDAHO CODE* §§ 53-201 to 53-268 (1994); 805 *ILL. ANN. STAT.* ch. 210, paras. 101 to 1205 (Smith-Hurd 1993 & Supp. 1995); *IND. CODE ANN.* §§ 23-16-1-1 to 23-16-12-6 (Smith-Hurd 1993 & Supp. 1995); *IOWA CODE ANN.* §§ 487.101 to 487-1105 (West 1987 & Supp. 1995); *KAN. STAT. ANN.* §§ 56-1a101 to 56-1a609 (1994); *KY. REV. STAT. ANN.* §§ 362.401 to 362.710 (Baldwin 1993 & Supp. 1995); *ME. REV. STAT. ANN.* tit. 31, §§ 401 to 528 (West 1978 & Supp. 1995); *MD. CODE ANN., CORPS. & ASS'NS* §§ 10-101 to 10-1105 (1993 & Supp. 1995); *MASS. GEN. LAWS ANN.* ch. 109, §§ 1 to 62 (West 1990 & Supp. 1995); *MICH. COMP. LAWS ANN.* §§ 449.1101 to 449.2108 (West 1989 & Supp. 1995); *MINN. STAT. ANN.* §§ 322A.01 to 322A.87 (West 1995 & Supp. 1996); *MISS. CODE ANN.* §§ 79-14-101 to 79-14-1107 (1989 & Supp. 1994); *MO. ANN. STAT.* §§ 359.011 to 359.691 (Vernon 1968 & Supp. 1996); *MONT. CODE ANN.* §§ 35-12-501 to 35-12-1404 (1995); *NEB. REV. STAT.* §§ 67-233 to 67-296 (1995); *NEV. REV. STAT. ANN.* §§ 88.010 to 88.645 (Michie 1994 & Supp. 1995); *N.H. REV. STAT. ANN.* §§ 304-B:1 to 304-B:64 (1995 & Supp. 1995); *N.J. STAT. ANN.* §§ 42:2A-1 to 42:2A-72 (West 1993 & Supp. 1995); *N.M. STAT. ANN.* §§ 54-2-1 to 54-2-63 (Michie 1988 & Supp. 1995); *N.Y. PARTNERSHIP LAW* §§ 121-101 to 121-1300 (McKinney Supp. 1996); *N.C. GEN. STAT.* §§ 59-101 to 59-1106 (1989 & Supp. 1995); *N.D. CENT. CODE* §§ 45-10.1-01 to 45-10.1-62, 45-12-01 (1993 &

business of the partnership of which he is a member binds the partnership. . . .<sup>490</sup>

Further, "the partnership is liable" for any "loss or injury . . . caused to any person" caused by "any wrongful act or omission of any partner . . . ."<sup>491</sup> Thus, every partner, insofar as he can bind the partnership, is necessarily involved in the management or operation of the partnership.<sup>492</sup> In the RICO context, the courts realize that the structure of a partnership is dramatically different from that of a corporation. In *Avianca, Inc., v. Corriea*,<sup>493</sup> for example, the District Court stated:

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Supp. 1995); OHIO REV. CODE ANN. §§ 1782.01 to 1782.63 (Anderson 1992 & Supp. 1994); OKLA. STAT. ANN. tit. 54, §§ 301 to 365 (West 1991 & Supp. 1996); OR. REV. STAT. §§ 70.005 to 70.490 (1993 & Supp. 1994); 15 PA. CONS. STAT. ANN. §§ 8501 to 8594 (1995); R.I. GEN. LAWS §§ 7-13-1 to 7-13-68 (1992 & Supp. 1995); S.C. CODE ANN. §§ 33-42-10 to 33-42-2040 (Law. Co-op. 1990 & Supp. 1995); S.D. CODIFIED LAWS ANN. §§ 48-7-101 to 48-7-1105 (1991 & Supp. 1995); TENN. CODE ANN. §§ 61-2-101 to 61-2-1208 (1989 & Supp. 1995); TEX. REV. CIV. STAT. ANN. art. 6132a-1 (West Supp. 1996); UTAH CODE ANN. §§ 48-2a-101 to 48-2a-1107 (1994 & Supp. 1995); VA. CODE ANN. §§ 50-73.1 to 50-73.78 (Michie 1994 & Supp. 1995); WASH. REV. CODE ANN. §§ 25.10.010 to 25.10.690 (West 1994 & Supp. 1996); W. VA. CODE §§ 47-9-1 to 47-9-63 (1995 & Supp. 1995); WIS. STAT. ANN. §§ 179.01 to 179.94 (1989 & Supp. 1995); WYO. STAT. §§ 17-14-201 to 17-14-1104 (1989 & Supp. 1995).

Unlike a general partnership, parties forming a limited partnership must complete, sign and file a certificate of limited partnership with either the county recorder's office under the ULPA PARTNERSHIP STATUTES, *supra* at 661 or the secretary of state under the RULPA. *Id.* at 683-84. Generally, the certificate of limited partnership must include:

- (1) the name of the limited partnership;
- (2) the address of the office and the name and address of the agent for service of process required to be maintained by Section 104;
- (3) the name and business address of each general partner;
- (4) the latest date upon which the limited partnership is to dissolve; and
- (5) any other matters the general partners determine to include therein.

*Id.* Under ULPA, the requirements for the certificate of limited partnership are much more extensive. *See id.* at 661-62 (setting forth requirements for certificate of limited partnership).

Only a few RICO cases involve a partnership as the enterprise. In *United States v. Cauble*, 706 F.2d 1322, 1331 (5th Cir. 1983), for example, the indictment identified Cauble Enterprises, a legal partnership, as the alleged enterprise. The Court held that "[t]he government's proof demonstrated that Cauble Enterprises is a limited partnership organized under the laws of Texas. 706 F.2d at 1343. It proved that the partnership has a formal organization and has operated continuously since 1972 for the purpose of seeking maximum long-term appreciation of the partners' capital." *Id.* at 1340. The decision did not elaborate on what proof the government supplied. *See Beauford v. Helmsley*, 865 F.2d 1386, 1391 (2d Cir.) (plaintiffs adequately alleged that partnership was the enterprise; but court did not elaborate on how plaintiff proved existence of partnership), *vacated and remanded*, 492 U.S. 914, *adhered to*, 893 F.2d 1433 (2d Cir.), *cert. denied*, 493 U.S. 992 (1989). *But see Furman*, 828 F.2d at 900-02 (partnership did not constitute an enterprise because of lack of continuity) *with Beauford*, 865 F.2d at 1391 (continuity is not an attribute of "enterprise" but, rather, of "pattern"). The limited partners of a limited partnership enjoy limited liability, provided that they remain passive with regard to the management and control of the limited partnership's activities. Nevertheless, if the certificate of limited partnership is not filed or filed incorrectly, or if the limited partner participates actively in the limited partnership's activities, the partnership is deemed a general partnership. Accordingly, the limited partners may be held generally liable.

490. *Uniform Partnership Act*, *supra* note 489, at § 9.

491. *Id.* at § 13.

492. The updated Uniform Partnership Act (1992), which is the law in two states, contains similar language on the liability of the partnership for the acts of partners. *Id.* at §§ 301, 305.

493. No. 85-3277 (RCL), 1992 WL 93127 (D.D.C. Apr. 13, 1992), amended 1993 WL 797453 (D.D.C. Mar. 16, 1993).

While the court sympathizes with the . . . argument that respondeat superior liability should not be imposed under RICO, the court notes that partnership liability is somewhat different from an employer's liability for an employee's intentional actions; whereas it may be unjust to hold a corporation treble liable for a single employee's criminal acts, the situation changes dramatically in the partnership context, *where all involved are high-level managers of the firm*.<sup>494</sup>

Any partnership, regardless of its professional function, that is, law partnerships, accounting partnerships, and real estate partnerships, are all structured in fundamentally the same fashion. Thus, that they provide different professional services to an enterprise should not effect their § 1962(c) liability under the *Reves* test.

### 5. Sole Proprietorship

Section 1961(4) specifically lists "individuals" as one of the types of legal entities that may constitute an enterprise.<sup>495</sup> While an individual may constitute the enterprise under certain limited circumstances,<sup>496</sup> the term "individual" is generally associated with a sole proprietorship. In *McCullough v. Suter*, the Seventh Circuit adopted a "one-man show" standard for determining if a particular sole proprietorship constituted an enterprise.<sup>497</sup> Under this test, the court inquires if the alleged defendant and enterprise were the same. The *McCullough* court concluded that the sole proprietorship was not a one-man show.<sup>498</sup> The Ninth Circuit added context to the "one-man show" standard, stating that "if an individual had no employees or other associates it strains the imagination to say that the individual is associated with an enterprise comprised solely of himself or herself."<sup>499</sup> In

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494. *Id.* at \*45-\*46 (emphasis added).

495. 18 U.S.C. § 1961(4) (1994).

496. *See, e.g.,* Von Bulow v. Von Bulow, 634 F. Supp. 1284 (S.D.N.Y. 1987) (holding attempted takeover of wife and her property through attempted murder by husband to be an enterprise).

497. 757 F.2d at 143-44. As the court described the standard:

There would be a problem if the sole proprietorship were strictly a one-man show. If Suter had no employees or other associates and simply did business under the name of the National Investment Publishing Company, it could hardly be said that he was associating with an enterprise called the National Investment Publishing Company; you cannot associate with yourself, any more than you can conspire with yourself. . . .

*Id.* at 144.

498. *Id.*

499. *United States v. Benny*, 786 F.2d 1410, 1415-16 (9th Cir.), *cert. denied*, 479 U.S. 1017 (1986); *see also Robinson*, 8 F.3d at 407 (holding enterprise was an incorporated business "that employed several hundred people and filed separate income tax returns"; thus, the enterprise and the defendant were separate); *United States v. Weinberg*, 656 F. Supp. 1020, 1024 (E.D.N.Y. 1987) (adhering to *McCullough* even though the government did not allege that the defendant was the enterprise; rather, it alleged that the defendant's business, which employed several persons, constituted the RICO enterprise; and holding allegation sufficient). *But see Guidry v. Bank of LaPlace*, 954 F.2d 278, 283 (5th Cir. 1992) (alleging sole proprietorship failed the one-man show standard); *United States v. Di Caro*, 772 F.2d 1314, 1320 (7th Cir. 1985) (finding violation of the enterprise-person rule where defendant alleged to be the enterprise), *cert. denied*, 475 U.S. 1081 (1986); *Yonan*, 622 F. Supp. at 724 (rejecting concept that, pursuant to *McCullough*, a sole proprietor could hire a secretary and thereby "magically

following the Seventh Circuit's "one-man show" standard, the Ninth Circuit found that the co-defendants were either "employed by or associated with the sole proprietorship." Accordingly, the Court held that the sole proprietorship was not a "one-man show," rather a "troupe," which constituted an enterprise. Obviously, the sole proprietor himself would manage or operate his own sole proprietorship under *Reves*.

## 6. Other Entities

### a. Governmental Entities

The definition of "enterprise" in § 1961(4) does not set out criteria that define the concept; instead, it defines by illustration. Accordingly, the circuit courts adopt the view that governmental entities, though not specifically listed, may constitute an enterprise. For example, in *United States v. Angelilli*,<sup>500</sup> the defendants, four marshals of New York City's Civil Court, were charged with violating §§ 1962(c) and 1962(d), and the prosecution alleged that the New York City Civil Court constituted the "enterprise." The Second Circuit determined that the statutory definition of enterprise was sufficiently broad to encompass governmental units.<sup>501</sup> In addition, the court concluded that its judgement reflected and furthered the congressional purposes underlying RICO. Similarly, in *United States v. Balzano*,<sup>502</sup> the Seventh Circuit held that "[t]he Chicago Fire Department is a legitimate governmental entity possessing a clear organizational structure, thus qualifying as an 'enterprise' under RICO."<sup>503</sup> Following this approach, a wide range of governmental offices and organizations are held to constitute an enterprise.<sup>504</sup> "Public offices" held to be "enterprises" include a state governor-

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[be] transformed . . . into an 'enterprise.' "), *aff'd in part, rev'd in part*, 800 F.2d 164 (7th Cir. 1986) (affirmed with regard to the enterprise discussion), *cert. denied*, 479 U.S. 1055 (1987).

500. 660 F.2d 23 (2d Cir. 1981), *cert. denied*, 455 U.S. 910 (1982).

501. *Id.* at 31.

502. 916 F.2d 1273 (7th Cir. 1990).

503. *Id.* at 1290.

504. Traditionally, a distinction is drawn between a public office, the public officer who fills it, and a public employee. *See, e.g.*, *Hall v. Wisconsin*, 103 U.S. 5, 9 (1880) ("Where an office is created, the law usually fixes the compensation, prescribes its duties, and requires that the appointee give a bond with sureties for the faithful performance of the service required."); *Hartwell*, 73 U.S. (6 Wall.) at 393 ("An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties. [It is generally created] pursuant to law . . . [with] compensation . . . fixed by law . . . . [D]uties . . . [are] continuing and permanent, not occasional or temporary . . . . A government office is different from a government contract."); *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747) (Marshall, C.J.) ("Although an office is 'an employment', it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act . . . without becoming an officer."). If the enterprise in the RICO indictment or complaint is plead as the "public office," it may be distinguished from its incumbent, who would, in all cases, be both its "operator" and its "manager." Public employees, on the other hand, serve within a "public organization" rather than fill a "public office." The issue of operation or management, therefore, ought not arise with a "public office," but it will be relevant to "public employees" in the same way that it is to private employees.

ship,<sup>505</sup> a state senatorship,<sup>506</sup> county judgeshipship,<sup>507</sup> a prosecuting attorneyship,<sup>508</sup> a county supervisorship,<sup>509</sup> and a beverage control commissionership.<sup>510</sup> "Public organizations" held to be "enterprises" include a state<sup>511</sup> or city court,<sup>512</sup> a state executive department,<sup>513</sup> a sheriff's department,<sup>514</sup> a police department,<sup>515</sup> a board of tax appeals,<sup>516</sup> and a retirement system.<sup>517</sup>

The classes of governmental individuals and entities, however, that may violate RICO criminally and sue and be sued civilly are not co-terminus. Criminal liability under RICO is defined by the narrower class "whoever,"<sup>518</sup> while civil liability under RICO—both for those who may sue and may be sued—is defined by the broader class "person."<sup>519</sup> "Person," too, is defined to include "any individual or entity capable of holding a legal or beneficial intent in property."<sup>520</sup> Nevertheless,

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505. *Thompson*, 685 F.2d at 994-95 (office of governor).

506. *United States v. Long*, 651 F.2d 239, 241 (4th Cir.) (office of state senator), *cert. denied*, 454 U.S. 896 (1981).

507. *United States v. Clark*, 646 F.2d 1259, 1261 (8th Cir. 1981) (office of county judge).

508. *United States v. Altomare*, 625 F.2d 5, 7 (4th Cir. 1980) (office of county prosecutor); *United States v. Karas*, 624 F.2d 500, 504 (4th Cir. 1980) (prosecutor's office), *cert. denied*, 449 U.S. 1078 (1981).

509. *United States v. Dean*, 647 F.2d 779, 781 (8th Cir. 1981) (office of county supervisor), *cert. denied*, 456 U.S. 1006 (1982).

510. *United States v. Barber*, 476 F. Supp. 182, 184 (S.D. W.Va. 1979) (office of alcohol beverage control commissioner).

511. *Stratton*, 649 F.2d at 1073 (circuit court).

512. *Angelilli*, 660 F.2d at 30-35 (city court); *United States v. Bachelier*, 611 F.2d 443, 450 (3d Cir. 1979) (traffic court); *Vignola*, 464 F. Supp. at 1094-95 (same).

513. *United States v. Hocking*, 860 F.2d 769, 778 (7th Cir. 1988) (department of transportation); *Dozier*, 672 F.2d at 543 n.8 (department of agriculture); *Frumento*, 563 F.2d at 1089-92 (bureau of cigarette and beverage taxes).

514. *United States v. Davis*, 707 F.2d 880, 882-83 (6th Cir. 1983) (sheriff's department); *Lee Stoller*, 652 F.2d at 1316-19 n.10 (same); *Bright*, 630 F.2d at 829 (sheriff's office); *United States v. Baker*, 617 F.2d 1060, 1061 (4th Cir. 1980) (sheriff's department).

515. *United States v. Alonso*, 740 F.2d 862, 870 (11th Cir. 1984) (section of public safety department), *cert. denied*, 469 U.S. 1166 (1985); *Grzywacz*, 603 F.2d at 685-87 (police department); *United States v. Brown*, 555 F.2d 407, 415-16 (5th Cir. 1977) (police department), *cert. denied*, 435 U.S. 904 (1978).

516. *United States v. Burns*, 683 F.2d 1056, 1057 (7th Cir. 1982) (board of appeals), *cert. denied*, 459 U.S. 1173 (1983).

517. *Police Retirement Sys. v. Midwest Inv. Advisory Servs.*, 706 F. Supp. 708, 711 (E.D. Mo. 1989).

518. 18 U.S.C. § 1963 (1994). "Whoever," in turn, is defined by 1 U.S.C. § 1 to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." It does not extend to governments. *United States v. United Mine Workers*, 330 U.S. 258, 275 (1947); *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941). "Nothing in RICO purports, therefore, to make criminal penalties applicable to state and local units of government." Blakey, *supra* note 3, at 243 n.20. Federal and state public officials and public employees are, on the other hand, not immune from federal criminal charges. See *United States v. Gillock*, 445 U.S. 360, 371-74 (1980) ("draw the line at civil actions"); *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974) ("[T]he judicially fashioned doctrine of official immunity does not reach so far as to immunize criminal conduct proscribed by an Act of Congress.") (quoting *Gravel v. United States*, 408 U.S. 606, 627 (1972)).

519. 18 U.S.C. §§ 1962(3), 1964(c) (1994).

520. 18 U.S.C. § 1961(3) (1994). An unincorporated association is not a "person." Compare *Fleischhaver*, 879 F.2d at 1299 (group for which corporate charter is not issued is not a person), with *Jund v. Town of Hempstead*, 941 F.2d 1271, 1282 (2d Cir. 1991) (political party that may hold interest in property is a "person").

the courts of appeals do not take § 1961(3) at its face value. Foreign, state, and local governments, but not the federal government, may sue under RICO;<sup>521</sup> neither federal<sup>522</sup> nor state<sup>523</sup> agencies may be sued. Further, while suits against public officers or employees may be brought, they are subject to various doctrines of privilege.<sup>524</sup> The operation or management test under *Reves* in criminal and civil litigation may be expected to play out in the context of this complex set of general rules. The selection of the enterprise here, too, will be crucial.

### *b. Associations-In-Fact*

Associations-in-fact are RICO "enterprises."<sup>525</sup> Associations-in-fact need not be formed between natural persons but may be formed between any combination

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521. *Compare* United States v. Bonnano Organized Crime Family, 879 F.2d 20, 21-27 (2d Cir. 1989) (federal government is not a "person"), *with* County of Oakland v. City of Detroit, 866 F.2d 839, 845 (6th Cir. 1989) (county is a "person"), *cert. denied*, 497 U.S. 1003 (1990), *and* Republic of Philippines v. Marcos, 862 F.2d 1355, 1358 (9th Cir. 1988) (foreign government is a "person"), *cert. denied*, 490 U.S. 1035 (1989), *and* Illinois Dep't of Revenue v. Phillips, 771 F.2d 312, 314-17 (7th Cir. 1985) (state is a "person"). *But see* Michigan v. Fawaz, 653 F. Supp. 141, 142-43 (E.D. Mich. 1986) (*Phillips* not followed), *aff'd without opinion*, 848 F.2d 194 (6th Cir. 1988).

522. *Berger v. Pierce*, 933 F.2d 393, 397 (6th Cir. 1991) (Federal Insurance Administration is not a person; "it is self evident that a federal agency is not subject to state or federal criminal prosecution").

523. *Genty*, 937 F.2d at 908-14 (municipal government).

524. Where the imposition of criminal or civil liability on governmental entities, officials, or employees is involved, a variety of constitutional considerations, statutes and judicial doctrines are implicated. *Nixon v. Fitzgerald*, 457 U.S. 731, 747 (1982) ("guided by the Constitution, federal statutes, . . . history . . . [and] common law"). The United States may not be sued without its consent. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821) (Marshall, C.J.). That limited consent is defined by the narrow terms of the Federal Tort Claims Act, 28 U.S.C. § 1346 (1976). *See generally* 14 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3658 (1976) (discussing Federal Tort Claims Act). Individual federal officials, too, possess an absolute or qualified immunity from personal civil liability. *Compare Nixon*, 457 U.S. at 749 (president possesses absolute immunity), *with Butz v. Economou*, 438 U.S. 478, 504-08 (1978) (secretary of agriculture possesses a qualified immunity). In addition, the eleventh amendment and related judicial doctrines preclude suits in federal courts by individuals against the states. U.S. CONST. amend. XI (suits by citizens of another state); *Hans v. Louisiana*, 134 U.S. 1, 10-19 (1890) (suits by its own citizens). *See generally*, 13 CHARLES A. WRIGHT, *et al.*, *supra* at § 3524 (1975) (discussing suits against states). Counties or municipalities do not enjoy similar immunity. *Monell*, 436 U.S. at 695-701 (municipality); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890) (county). State officials also possess personal immunities. *Scheuer v. Rhodes*, 416 U.S. 232, 238-49 (1974) (executive official possesses qualified immunity); *Pierson v. Ray*, 386 U.S. 547, 553-57 (1967) (state judge possesses absolute immunity; a police officer possesses qualified immunity); *Tenney v. Branchove*, 341 U.S. 367, 372-75 (1951) (express abrogation of absolute privilege by state legislature required). These general rules are applied to RICO. *See, e.g.*, *Chappell v. Robins*, 73 F.3d 918, 924 (9th Cir. 1990) (state legislator absolutely immune under RICO) ("In short, we find nothing in the nature of RICO's statutory structure which evinces any clear congressional intent to abrogate legislative immunity"; liberal construction does not indicate different result) (citing *Reves*); *Powers v. Lightner*, 820 F.2d 818, 822 (7th Cir. 1987) (FBI agents possess qualified immunity under RICO), *cert. denied*, 484 U.S. 1078 (1988); *Thillens, Inc. v. Community Currency Exch. Ass'n*, 729 F.2d 1128, 1130-31 (7th Cir.) (state legislators possess unqualified immunity under RICO), *cert. dismissed*, 469 U.S. 976 (1984); *Fiore v. Kelly Run Sanitation*, 609 F. Supp. 909, 912 n.1 (W.D. Pa. 1985) (11th amendment precludes suit under RICO in federal court); *Productions & Leasing v. Hotel Conquistador*, 573 F. Supp. 717, 720 (D. Nev. 1982) (same), *aff'd*, 709 F.2d 21 (9th Cir. 1983); *cf. Gerritsen v. Consulado Gen. de Mexico*, 989 F.2d 340 (9th Cir.) (unqualified foreign diplomatic immunity under RICO), *cert. denied*, 114 S. Ct. 95 (1993).

525. 18 U.S.C. § 1961(4) (1994).

of natural persons and legal entities, and they may seek to achieve either wholly illicit ends or a combination of licit and illicit ends.<sup>526</sup> The application of the *Reves* "operation or management" test to associations-in-fact ought to reflect the general approach taken to joint enterprises or joint ventures. "A 'joint enterprise' is something like a partnership, but it exists for a more limited period of time, and a more limited purpose."<sup>527</sup> Typically, all members of a joint enterprise "have an equal voice in directing the conduct of the enterprise."<sup>528</sup> The members of a joint enterprise are treated as agents of all the other members; thus, "the act of any one within the scope of the enterprise is to be charged vicariously against the rest."<sup>529</sup> Most "legitimate" associations-in-fact alleged to be RICO enterprises will be created through written documents that will determine the roles to be played by the various members. Obviously, these documents will be instructive in determining who, if not everyone, is involved in managing the joint venture. Where the RICO enterprise is an association-in-fact comprised of legal entities, even without a legal agreement, the actions they take to further their profitability will often result in each member of the association participating in the operation or management of the enterprise or at least acting under the direction of those who do manage.

The Fourth Circuit's decision in *United States v. Barsanti*,<sup>530</sup> a non-RICO case, provides an illuminating view of "management" within the context of a joint venture. In *Barsanti*, a real estate agent who was involved in both legitimate and illegal activities was found to be a "manager" under the United States Sentencing Guidelines in a scheme to defraud the government through false loan applications.<sup>531</sup> The real estate agent (Griffey) contacted the investors, who would apply for and receive low-interest loans when a specific scenario developed which permitted the fraud to occur.<sup>532</sup> For instance, Griffey contacted the investors when a prospective buyer who had already made a refundable deposit to hold the property (condominiums) changed his or her mind and decided not to purchase.<sup>533</sup> The investors would then pay the buyer to fill out a government loan application in which the buyer would falsely claim to be an owner-occupant of the property. If the loan was granted, the investor would be eligible to receive a low-interest loan for nearly the entire purchase price; the property would then be leased to a third party.<sup>534</sup> On appeal from his conviction, Griffey argued that he was not a manager in the scheme because he was only contacting the individuals who perpetrated the

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526. See APPENDIX G (ASSOCIATION IN FACT).

527. *Prosser*, *supra* note 290 at .

528. *Id.*

529. *Id.*

530. 943 F.2d 428 (4th Cir. 1991), *cert. denied*, 503 U.S. 936 (1992).

531. *Id.* at 440.

532. *Id.* at 430.

533. *Id.*

534. *Id.*

actual fraud.<sup>535</sup> The Fourth Circuit disagreed, holding that Griffey “was an essential link in the conspiracy, managing and supervising and arranging for the deals to be struck.”<sup>536</sup> Thus, a person who brings the players together to commit a fraudulent transaction is a *manager* of the enterprise engaged in the fraud. The relatively minor role that Griffey played in the scheme was magnified because the enterprise was a joint venture.

In a corporation, a purchasing agent who is instructed to call a specific vice-president when certain circumstances arise would probably not be found to be managing the corporation. Nevertheless, when Griffey knowingly called the other members of the association so that they could perpetrate a fraud on the government, he was considered to be managing the enterprise. While he was not involved in financing the fraud, his actions to bring the necessary players together were managerial.<sup>537</sup>

Associations-in-fact of natural persons formed for wholly illegal purposes are likely to receive the toughest treatment from courts applying the *Reves* test. Courts will likely find that nearly every member of the enterprise was involved in operating or managing it, or at least acting under the direction of those who operate or manage it. If not, they will probably be held to be accessories, aiders and abettors, or coconspirators of the managers.<sup>538</sup> The harsh treatment given such illicit associations in related areas of the law foreshadows the difficult task that such individuals will have in convincing courts that they were not involved in the management of the enterprise, either as managers or those who act under their direction. The United States Sentencing Guidelines are, for example, written so that courts easily find that most individuals who are involved in illicit associations manage the enterprise; thus, to be involved in the management, a person needs only be responsible for one other individual.<sup>539</sup>

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535. *Id.* at 439.

536. *Id.* at 440.

537. *Id.*

538. The analogy to partnership law, where every partner is liable for the acts of the other partners, is compelling when the enterprise is comprised of individuals who share a common criminal purpose. Under general conspiracy jurisprudence, for example, individuals who comprise the association are all vicariously and substantively liable for the acts of their co-conspirators that are in furtherance of the conspiracy. *See Pinkerton*, 328 U.S. at 647 (a conspiracy is a “partnership in crime”). Liability for RICO criminal forfeitures, too, is joint and several. *See, e.g., United States v. Caporale*, 806 F.2d 1487, 1506-09 (11th Cir. 1986) (allowing joint and several liability for coconspirators under RICO), *cert. denied*, 482 U.S. 917 (1987).

539. For other not necessarily inconsistent views of *Reves* and its progeny, *see* Michael Vitiello, *More Noise from the Tower of Babel: Making “sense” out of Reves v. Ernst & Young*, 56 OHIO ST. L.J. 1396 (1995); Daniel R. Fischel & Alan O. Sykes, *Civil RICO after Reves: An Economic Commentary*, 1993 SUP. CT. REV. 157 (1994); Carie J. Disanto, Comment, *Reves v. Ernst & Young: The Supreme Court’s Enigmatic Attempt to Limit Outsider Liability Under 18 U.S.C. § 1962(c)*, 71 NOTRE DAME L. REV. 1059 (1996); Jeffrey N. Shapiro, Comment, *Attorney Liability Under RICO § 1962(c) After Reves v. Ernst & Young*, 61 U. CHI. L. REV. 1153 (1994); J. Todd Benson, Note, *Reves v. Ernst & Young: Is RICO Corrupt?* 54 LA. L. REV. 1685 (1994); Bryan T. Camp, *Dual Construction of RICO: The Road not Taken is Reves*, 51 WASH. & LEE L. REV. 61 (1994).



## VI. *REVES* IN THE CIRCUITS AND STATES

### A. *Introduction*

The reception of the *Reves* operation or management test in the circuit courts of appeal is neither even nor thoughtful. *Reves* is not carefully read against the background of general jurisprudence. The Supreme Court's opinion is viewed in isolation. The decision of the courts of appeals are characterized by an unfortunate tendency to read *Reves* as embodying a per se exclusion for "outsiders", that is, to afford errant professionals—accountants or lawyers—a safe harbor from RICO liability under § 1962(c). The decisions draw a sharp and unjustifiable distinction between "outsiders" and "insiders," which is sometimes expressed in terms of a "horizontal" and "vertical" relationship to or with the enterprise. Insufficient attention, too, is given to distinctions that might properly be drawn between the various types of enterprises. Similarly, insufficient attention is also given to classifying alternatively "outsiders" as "insiders." "Outsiders" typically fall within the per se exclusion. "Insiders" are exculpated, however, only if they are lower down the ladder of responsibility within the enterprise and they act without knowledge of the relation between their conduct and the other aspects of the enterprise, in particular its illicit aspects, when the enterprise reflects both licit and illicit activity. Typically, attention is not paid to the time-honored distinction between principals in the first degree and principals in the second degree or accessories or coconspirators. Pleadings and arguments are accepted at face value without due attention being paid to the duty on the part of courts to do substantial justice between the parties, where a sharp change in the law occurs, as in *Reves*. When attention is turned to the question of conspiracy, the decisions are fortunately moving in the right direction, that is, *Reves* is not extended beyond its facts or its rationale to impose on RICO a special capacity rule, not found in other areas of conspiracy or accomplice jurisprudence. The role of principle in the second degree or accomplice liability is not yet fully perceived or developed in the cases. While in theory, at least, the results in the decisions should not turn on the criminal or civil character of the appeal, a marked tendency is present to uphold criminal prosecutions, but dismiss civil litigation under RICO. Clearly, the federal courts of appeals need to stop and take stock of the misdirection of some of their post-*Reves* jurisprudence.

### B. *The First Circuit*

The First Circuit's developing *Reves* jurisprudence is unremarkable, except for one minor aspect of a single decision. The decisions faithfully follow *Reves*, neither giving it scope beyond its holding nor attempting to narrow it by distinguishing it on its facts. The First Circuit first considered the *Reves* in *United*

*States v. Weiner*,<sup>540</sup> where it rejected Weiner's argument that the district court's instruction on the type of participation required under § 1962(c) was contrary to the "operation or management" test of *Reves*. The district court instructed the jury that "the terms 'conduct' and 'participate' in the context of the affairs of the enterprise include the intentional and deliberate performance of acts, functions or duties which are related to the operation or management of the enterprise."<sup>541</sup> Weiner claimed that the word "include" in the instruction "could suggest that lesser conduct fostering the enterprise in any form is enough to convict."<sup>542</sup> Judge Michael Boudin reviewed this instruction for plain error<sup>543</sup> and found none, stating that "aside from the word 'include,' there is nothing in the instruction nor in any other part of the court's charge which suggests that something less than involvement in the operation or management of the enterprise will do."<sup>544</sup> Though the jury instruction was written before *Reves*, the First Circuit upheld it, since it mirrored the "operation or management" test of *Reves* precisely.

*United States v. Oretto*<sup>545</sup> was heard by the First Circuit more than a year later. Once again, the attack on appeal was on instructions to the jury concerning the meaning of "conduct or participate . . . in the conduct of" an enterprise.<sup>546</sup> Writing for the court, Judge Boudin appropriately explained that *Reves* is "a case about the liability of outsiders who may assist the enterprise's affairs."<sup>547</sup> Accordingly, "[s]pecial care is required in translating *Reves*' concern with 'horizontal' connections—such as the liability of an outside adviser—into the 'vertical' question of how far RICO liability may extend, within the enterprise, down the organizational ladder."<sup>548</sup> The court reasoned that the accountants were not liable in *Reves*

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540. 3 F.3d 17 (1st Cir. 1993). Weiner, a director, consultant and stockholder of Capitol Bank and Trust Company of Boston ("Capitol"), associated himself with a loan sharking enterprise headed by Frank Oretto, Sr., for the purpose of collecting certain loans in default that were made by Capitol. *Id.* at 19. The loan shark operation employed "tall, physically imposing men who used threats of violence to collect from debtors who fell behind in their payments." *Id.* Capitol compensated Oretto through Weiner with off-the-record cash payments in return for his services. Together with other defendants, Weiner was charged in a multi-count indictment revolving around loan sharking and illegal debt collection, but Weiner's case was severed for reasons relating to his health and he stood trial alone. (The other defendants were tried and convicted in *United States v. Oretto*, 37 F.3d 739 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 1161 (1995)). The jury convicted Weiner of conspiring to violate, and violating, RICO, and of three counts of extortion conspiracy under 18 U.S.C. § 894. *Weiner*, 3 F.3d at 19.

541. *Id.* at 24.

542. *Id.*

543. An objection not raised in district court is reviewed for plain error. *United States v. Georgacarakos*, 988 F.2d 1289, 1294 (1st Cir. 1993).

544. 3 F.3d at 23.

545. 37 F.3d 739 (1st Cir. 1994), *cert. denied*, 115 S.Ct. 1161 (1995).

546. The District Court gave the following instruction:

The term "conduct" and the term "participate in the conduct of" an enterprise include the performance of acts, functions or duties which are necessary to or helpful in the operation of the enterprise. A person may be found to conduct or to participate in the conduct of an enterprise even though he is a mere employee having no part in the management or control of the enterprise and no share in the profits.

*Id.* at 750.

547. *Id.*

548. *Id.*

because, "while they were undeniably involved in the enterprise's decisions, they neither made those decisions nor carried them out; in other words, the accountants were outside the chain of command through which the enterprise's affairs were conducted."<sup>549</sup> Accordingly, the government was unable to show that two of the defendants participated in the enterprise's decision-making. Nevertheless, the court appropriately found that "they and other collectors were plainly integral to carrying out the collection process."<sup>550</sup> Judge Boudin determined that nothing in *Reves*, which defines "participate" as to "take part in," precludes the holding that "one may 'take part in' the conduct of an enterprise by knowingly implementing decisions, as well as by making them."<sup>551</sup> Considering the statutory purpose of RICO,<sup>552</sup> the First Circuit correctly decided that "Congress intended to reach all who participate in the conduct of [an] enterprise, whether they are generals or foot soldiers."<sup>553</sup> That participation, too, could come through, the court unremarkably held, aiding and abetting.<sup>554</sup> One defendant, Oreto, Jr.,<sup>555</sup> also argued that the

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549. *Id.* In a district court case arising in the First Circuit, attorneys were also found to be outside the chain of command. *Bowdoin Constr. Corp. v. Rhode Island Hosp. Trust Nat'l Bank, N.A.*, 869 F. Supp. 1004 (D. Mass. 1994), involved a contractor (Bowdoin) for a hotel renovation project who brought suit against the developer and its executives; the lead lender (Rhode Island Hospital Trust National Bank or "RIHT") and its officers; RIHT's parent company, the First Nat'l Bank of Boston; a supporting lender and its officers; and all of the respective attorneys for the defendants. Bowdoin sued for RICO violations arising out of misrepresentations that resulted in the contractor incurring expenses which were never reimbursed. The district court held that the complaint made sufficient allegations of operation and management of the enterprise only against RIHT, the developer and the developer's executives. *Id.* at 1009. While the plaintiff sued the law firms representing the lead bank and the participating bank in the loan, alleging that the firms, with full knowledge of the fraud being perpetrated, counselled their respective clients to continue to participate in the fraudulent transactions, the court held this claim to be "insufficient as a matter of law under the *Reves* test." *Id.* The court cited another district court case in which *Reves* was applied to bar a RICO suit against attorneys. *See Morin v. Trupin*, 832 F. Supp. 93, 98 (S.D.N.Y. 1993) ("Even if this Court found that 'these defendants [attorneys] had substantial persuasive power to induce management to take certain actions,' this is still not equivalent to having power 'to conduct or participate directly or indirectly in the affairs of those corporations.'").

550. *Oreto*, 37 F.3d at 750.

551. *Id.*

552. The First Circuit noted that Congress declared the statutory purpose of RICO to be "the eradication of organized crime in the United States" and that "loansharking" was listed by Congress as "a means by which organized crime derives much of its power." *Id.* at 751 (citing Pub. L. No. 91-452, § 1 (Statement of Findings and Purpose following 18 U.S.C. § 1961)).

553. *Oreto*, 37 F.3d at 751.

554. *Id.* The Court aptly observed:

Appellants objected to the trial court's instruction that the jury could find a pattern of racketeering activity if the appellants committed or aided and abetted the commission of at least two of the specified racketeering acts. Our court has observed that "[a]iding and abetting is an alternative charge in every count, whether explicit or implicit," . . . and it appears that most if not all courts to consider the issue have held that a defendant may be convicted of aiding and abetting a conspiracy.

*Id.* (citation omitted; emphasis in original).

555. Oreto, Jr. served as a collector for the loansharking company owned by his father, Oreto, Sr. The jury convicted Oreto, Jr. on one count of conspiring to violate RICO, 18 U.S.C. § 1962(d), as well as one substantive RICO count, 18 U.S.C. § 1962(c). He was also convicted on four counts of conspiring to collect loans by extortionate means. *Oreto*, 37 F.3d at 743.

government “failed to demonstrate that he had ‘participated in the management or control of the alleged enterprise’ because the proof showed only that he ‘was a mere collector for a short period of time.’ ”<sup>556</sup> Here, too, the court rightly decided that “there is no requirement that participation extend over a long period,”<sup>557</sup> and that the evidence was sufficient to show the defendant involved in at least four transactions in connection with the loansharking enterprise. Another defendant, Petrosino,<sup>558</sup> challenged his RICO convictions by arguing that the government only proved him to be a “collector paid \$50 weekly for a bare five months,”<sup>559</sup> and by arguing that this evidence was insufficient to show that “he participated in the operation or management of the enterprise itself.” The court held that the statute requires neither that the defendant share in the enterprise’s profits, nor participate for an extended period of time, so long as the predicate act requirement is met.<sup>560</sup> The collection of seven separate loans by the defendant by extortionate means, in short, was sufficient.

The third case in which the First Circuit discussed the *Reves* “manage or operate test,” though civil in character, was *Aetna Casualty & Surety Co. v. P & B Autobody*,<sup>561</sup> a RICO case where defendants included five body shops, their employees (the Arsenal defendants), and Aetna appraisers who covered the area where these body shops were located. All the defendants were involved in a scheme to obtain payments on fraudulent insurance claims. *Aetna* is one of the most comprehensively analyzed and soundly reasoned post-*Reves* decisions in the federal courts of appeals. The jury found each of the Arsenal defendants liable for a substantive RICO violation under § 1962(c) for participating in the affairs of Aetna through a pattern of racketeering activity.<sup>562</sup> The district court considered five different theories, asserted in five different counts.<sup>563</sup> Count VIII alleged a

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556. *Id.* at 753.

557. *Id.*

558. Petrosino, like Oreto, Jr., also served as a collector for the loansharking operation. He was convicted by a jury for one count of conspiring to violate RICO, 18 U.S.C. § 1962(d), one count of a substantive RICO violation, 18 U.S.C. § 1962(c), and seven counts of conspiring to collect loans by extortionate means. *Oreto*, 37 F.3d at 743.

559. *Id.* at 753.

560. *Id.*

561. 43 F.3d 1546 (1st Cir. 1994).

562. *Id.* at 1552.

563. The District Court considered three claims of RICO substantive violations, one claim of RICO conspiracy and one non-RICO conspiracy claim. *Id.* at 1553. The various claims were as follows:

*First.* Count VII, a RICO substantive violation under § 1962(c) alleging an association-in-fact enterprise. This claim was dismissed [by] the trial court.

*Second.* Count VIII, a RICO substantive violation under § 1962(c) alleging that Aetna was the enterprise. The jury found that this claim was proved against all of the individual Arsenal appellants.

*Third.* Count VI, a RICO substantive violation under § 1962(c), alleging [that] Arsenal Auto [was] the enterprise. The jury found that this claim was proved against all [of the] individual Arsenal appellants.

*Fourth.* Count IX, alleging a RICO conspiracy under § 1962(d). The jury found that this claim was proved against all [of the] individual Arsenal appellants.

§ 1962(c) violation with Aetna as a “victim” enterprise, a well-established theory.<sup>564</sup> To prove this claim, the court held that Aetna did not have to show the same relationships between the defendants that were essential to the association-in-fact enterprise alleged in Count VII. The court appropriately reasoned that to satisfy the “enterprise” element of a RICO substantive violation, the plaintiff may prove the existence either of a legal entity, such as a corporation, or of a group of individuals who were associated-in-fact. Because Aetna was a corporation, it constituted an “enterprise” for the purpose of Count VIII, even if no proof was offered of an association-in-fact enterprise. In contrast, the court stated that Count VII did allege an association-in-fact enterprise that required proof of an “ongoing organization” with members “functioning as a continuing unit” that was “separate and apart from the pattern of racketeering in which it engage[d].”<sup>565</sup> Since no party challenged the district court’s dismissal of this claim, the First Circuit declined to determine the precise elements required to prove an association-in-fact enterprise, but it observed that it was “clear that an association-in-fact enterprise is different from an enterprise that is a legal entity, like Aetna.”<sup>566</sup> The court also correctly rejected the argument that to prove a RICO conspiracy, the plaintiff was required to prove the existence of an association-in-fact enterprise. The court held that “[s]ection 1962(d) does not require proof of an association-in-fact enterprise. Any enterprise meeting the definition of enterprise in § 1961 will do. Under § 1961, an enterprise may include a legitimate legal entity like Aetna as the victim of the racketeering activity.”<sup>567</sup>

In *Aetna*, defendants also argued that they could not “be held liable for a RICO substantive violation with Aetna as the enterprise because they were not even ‘associates’ of the enterprise, but were outsiders, and as outsiders could not be said to have ‘participated in the conduct’ of Aetna’s affairs.”<sup>568</sup> The First Circuit rightly rejected this argument, noting that the statute uses the phrase “associated with,” rather than creating a narrow category of “associates.”<sup>569</sup> The court then offered the example of a person who “buys an insurance policy from an enterprise and depends on the solidarity of that enterprise, for protection against defined risks” as a person who has an association with, and may be said to have “associated with,” the enterprise.<sup>570</sup> Accordingly, the appellants were all held to be “associated with” the Aetna enterprise for purposes of § 1962(c).<sup>571</sup> The defendants also argued on

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*Fifth.* Count X, common law civil conspiracy. The jury found that this claim was proved against all [of the] appellants . . . .

*Id.*

564. *Scheidler*, 114 S.Ct. at 804 n.5 (citing *Blakey*, *supra*, note 3 at 307-325).

565. *Id.* at 1557 (quoting *Turkette*, 452 U.S. at 583).

566. *Id.*

567. *Id.*

568. *Id.* at 1559.

569. *Id.*

570. *Id.*

571. The Court reasoned that each of the individual appellants was either an insured or a claimant under an

appeal that no reasonable jury could have found that they “participated directly or indirectly in the conduct of the enterprise’s affairs” because they did not “participate in the operation or management of [Aetna] itself,” as required by *Reves*.<sup>572</sup> Here, too, the court appropriately rejected this argument, holding that sufficient evidence was introduced to meet the “operation or management” test. Judge Robert E. Keeton, writing for the court, held, “[a]ppraising allegedly damaged vehicles and investigating, processing, and paying automobile insurance claims are vital parts of Aetna’s business. By acting with purpose to cause Aetna to make payments on false claims, [defendants] were participating in the ‘operation’ of Aetna.”<sup>573</sup> That participation, too, could come, the court appropriately held, through committing, or aiding and abetting the commission of, the predicate acts.<sup>574</sup> The First Circuit then explained that the *Reves* Court interpreted the phrase “conduct of the enterprise’s affairs” to indicate a “degree of direction,” and that the individual Arsenal defendants’ activities affected, to a material degree, the direction of Aetna’s affairs by causing Aetna employees to direct other employees to make payments they otherwise would not have made.<sup>575</sup> Noting that the *Reves* Court emphasized that “defendants’ participation could be ‘indirect,’ in the sense that persons with no formal position in the enterprise could be held liable under § 1962(c),”<sup>576</sup> the First Circuit then appropriately found that the evidence was sufficient to support the conclusion that defendants participated in the conduct of Aetna’s affairs. Further, the First Circuit noted that in *Reves*, the Supreme Court expressly recognized that “an enterprise also might be operated or managed by others ‘associated with’ the enterprise who exert control over it as, for example, by bribery.”<sup>577</sup> Thus, the evidence supported the finding “that [defendants] caused the Aetna appraisers to approve false claims and conduct their appraisals in a manner contrary to Aetna’s business practices . . . .”<sup>578</sup> Finally, Judge Keeton then held that defendants exerted control over the enterprise, if not by bribery, then “at least by other methods of inducement,”<sup>579</sup> thereby appropriately satisfying the “operation or management” test.

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Aetna policy, thereby having a contractual relationship with Aetna, or an owner or operator of a body shop that was involved in repairing automobiles insured by Aetna. *Id.*

572. *Id.*

573. *Id.*

574. *Id.* at 560 (citing *Oreto*, 37 F.2d at 751 and *Pereira v. United States*, 347 U.S. 1, 9 (1954) (§ 1341 (mail fraud) may be violated through § 2.)). While the predicate offenses are criminal, proof need only be by preponderance of the evidence. *Id.* (citing *Combustion Engineering Inc. v. Miller Hydro Group*, 13 F.3d 437, 436 (2d Cir. 1993) (RICO; fraud; preponderance)).

575. *Id.*

576. *Id.*

577. *Id.* at 1560 (quoting *Reves*, 507 U.S. at 184).

578. *Id.*

579. *Id.* The First Circuit did not discuss *Reves* in *Libertad v. Welch*, 53 F.3d 428 (1st Cir. 1995). *Libertad*, however, raises at least one major issue that warrants extended discussion: the expansion of the Hobbs Act, 18 U.S.C. § 1951 (1994) beyond extortion (obtaining property, tangible or intangible) to coercion (forcing a person to do or not do something). See APPENDIX H (EXTORTION).

In a more recent decision, *United States v. Hurley*,<sup>580</sup> eight defendants challenged their RICO conspiracy convictions for participating in an extensive money laundering operation.<sup>581</sup> The First Circuit held that for the RICO conspiracy counts the government had to prove an agreement by appellants to “conduct or participate . . . in the conduct of [an] enterprise’s affairs through a pattern of racketeering activity.”<sup>582</sup> Defendants argued in the First Circuit that the instructions given to the jury by the district court concerning the meaning of “conduct or participate” were erroneous in light of *Reves*. The instructions were similar to those given in *Oreto*, where they were upheld. The *Hurley* court stated, “[t]he difference—which appellants deem crucial—is that the *Oreto* instruction encompassed defendants who perform acts ‘necessary to or helpful in the operation of the enterprise,’ whereas the instruction in this case encompassed defendants who perform acts ‘related to the operation of the enterprise.’”<sup>583</sup> According to defendants, this instruction directly contradicted *Reves* by allowing almost any involvement in the affairs of an enterprise to satisfy the “conduct or participate” requirement. The First Circuit reasoned that “the relatedness reference might pose a problem if a defendant were arguably an outsider, such as the independent auditor in *Reves*.” Nevertheless, because the *Hurley* defendants were placed squarely in the role of knowledgeable employees of the enterprise, the First Circuit determined the “alleged ambiguity in the instructions [to be] harmless.”<sup>584</sup> The court, therefore, rightly upheld the convictions, following its holding in *Oreto* that insider employees who are “plainly integral to carrying out” the racketeering activities are liable under RICO.<sup>585</sup> On the other hand, by only considering defendant’s argument that the *Reves* “operation or management” test was not applied correctly in the jury instructions, the First Circuit inappropriately and inexplicably ignored that *Reves* addressed *only* the extent of “conduct or participation” necessary to violate § 1962(c)—a substantive provision of the statute, where defendants’ appeal in *Hurley* was concerned with § 1962(d) conspiracy convictions. Traditional conspiracy law<sup>586</sup> and the *Reves* jurisprudence developing in the other circuits amply

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580. *United States v. Hurley*, 63 F.3d 1 (1st Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3604 (Feb. 26, 1996) (No. 95-1368).

581. The money laundering operation was organized by Stephen Saccoccia who owned and controlled several precious metals businesses. In the late 1980s, he began laundering drug money for Duvan Arboleda, a Colombian narcotics dealer. Saccoccia would receive large amounts of cash in New York, which would be counted and divided by his employees and then used in various transactions. Between March 1, 1990 and August 22, 1991, Saccoccia or his wife wired over \$136 million to foreign bank accounts located primarily in Colombia. *Id.* at 6-7.

582. *Id.* at 9.

583. *Id.*

584. *Id.* See also *United States v. Gabriele*, 63 F.3d 61, 68 (1st Cir. 1995) (following *Oreto* and *Hurley* and affirming defendant’s conviction for violation of § 1962(c), where defendant engaged in monetary transactions in criminally derived property; “Gabriele, unlike the accounting firm in *Reves*, was not an independent ‘outsider’ but a full-fledged ‘employee’ of the Saccoccia enterprise . . .”).

585. *Hurley*, 63 F.3d at 9.

586. See *supra* note 338, *et. seq.*

demonstrate that the manage or operate test does not circumscribe § 1962(d).<sup>587</sup> The Circuit, in short, missed the point.

In *United States v. Gabriele*,<sup>588</sup> the defendant was indicted on a RICO conspiracy charge for involvement in a money laundering operation.<sup>589</sup> The criminal enterprise, headed by Stephen Saccoccia, laundered money for Columbian drug dealers through various techniques, including the purchase of gold and cashier's checks. Some of the gold was transferred to Recovery Technologies, Inc. ("RTI"), owned and operated by the defendant, Gabriele. With Gabriele's consent, the gold was kept in a safe at RTI. When two of Saccoccia's other companies were discovered to be under FBI surveillance, Saccoccia announced his intention to acquire RTI, hired Gabriele as an employee, and began to divert to RTI the cash and gold that could no longer be delivered to the other companies.<sup>590</sup> Gabriele recorded these shipments in coded language and wired the funds to various banks at Saccoccia's direction.

Gabriele appealed the RICO conspiracy conviction, arguing that "it was error to instruct the jury that it need not find that he had 'directed' the Saccoccia enterprise since 'an enterprise is operated not just by upper management but also by lower rung participants who act on the direction of upper management.'" <sup>591</sup> The First Circuit appropriately held that this argument was foreclosed by its *Hurley* decision, noting that "*Reves* has no relevance to defendants who were 'employees' as distinguished from independent or outside participants like the accounting firm in *Reves*."<sup>592</sup> The court stated that the government introduced ample evidence that Gabriele, "unlike the accounting firm in *Reves*, was not an independent 'outsider' but a full-fledged 'employee' of the Saccoccia enterprise."<sup>593</sup> The court then noted the anticipated "purchase" of RTI from Gabriele by Saccoccia and the instructions given by Saccoccia to underlings to leave cash for Gabriele; it appropriately concluded that "even employees not engaged in directing the operation of the RICO enterprise are criminally liable if they are 'plainly integral to carrying [it] out.'" <sup>594</sup> According to the court, this was the correct instruction given to the jury.

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587. See, e.g. *infra* note 801, *et. seq. Accord*, *United States v. Houlihan*, 92 F.3d 1271, 1298-99 (1st Cir. 1996) (citing *Hurley* and *Oreto*). In *Schultz v. Rhode Island Hospital Trust Nat'l Bk*, 1996 U.S. App. LEXIS 2146 (1st Cir. August 22, 1996) the First Circuit reserved decision on whether under *Central Bank* aiding and abetting securities fraud may be a predicate act under RICO. *Id.* \*32. The court found insufficient evidence of fraud or a "pattern". *Id.* 33-35.

588. *United States v. Gabriele*, 63 F.3d 61 (1st Cir. 1995).

589. *Gabriele* is the final installment in the appellate proceedings arising out of an extensive money laundering operation that lasted from the mid 1980s through 1991. For the earlier proceedings, see *United States v. Saccoccia*, 58 F.3d 754 (1st Cir. 1995), and *United States v. Hurley*, *supra* note 580.

590. 63 F.3d at 64.

591. *Id.* at 68. The First Circuit cited *Reves*, 113 S. Ct. at 1170, 1172.

592. 63 F.3d at 68.

593. *Id.*

594. *Id.* (citing *United States v. Oreto*, 37 F.3d 739 (1st Cir. 1994)).



### C. *The Second Circuit*

In contrast to that of the First Circuit, the post-*Reves* jurisprudence in the Second Circuit is uneven. The Court tends to view *Reves* as a per se exclusion, or safe harbor, for outsiders, such as lawyers. On the other hand, it is willing to go down fairly far on the ladder of insiders—at least where they are knowledgeable. It also rightly recognizes that *Reves* does not touch conspiracy liability under § 1962(d). In contrast to the First Circuit, it does not yet, however, recognize that *Reves* also does not touch aid and abetting liability in appropriate situations.

The Second Circuit first considered *Reves* in *Azzielli v. Cohen Law Offices*,<sup>595</sup> which involved transactions related to the acquisition of an apartment building in a purported “flip” sale.<sup>596</sup> One of the named defendants, Khani, argued on appeal that the RICO claim against him should be dismissed because he merely acted as an attorney for the other individual defendants, who actually purchased the property and conducted the fraudulent flip sale.<sup>597</sup> The Second Circuit agreed with Khani and affirmed the dismissal of the RICO claims against him. The Second Circuit observed that in *Reves*, the Supreme Court held that the accounting firm, “whose alleged wrongdoing was its failure to inform the plaintiffs of the defendant’s financial condition, did not participate in defendant’s management or operation and hence was not subject to liability under RICO.”<sup>598</sup> The Second Circuit then analogized the position of Khani, as an attorney, to that of the accountants in *Reves*. The Court acknowledged that Khani was alleged to have represented the defendants in most of the transactions at issue, but it found that he played no role either in the events prior to the defendants being referred to him as clients, or in “the conception, creation, or execution” of the purported flip sale.<sup>599</sup>

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595. 21 F.3d 512 (2d Cir. 1994).

596. A “flip” sale is “a transaction in which one person acquires the right to purchase a property and immediately sells that right for profit.” *Id.* at 514.

597. The defendants included Bankin, who was the middle person in the alleged flip sale, Yekimov and Rachkauskas, who purchased from Bankin in the flip sale, and Khani, who represented Bankin and/or Yekimov and Rachkauskas in most of the transactions at issue. On September 10, 1985, Bankin entered into a contract to purchase an apartment building in New York City from 217 East 29th Street Equities Group for \$770,000. Ten days later, he entered into a formal contract with Yekimov and Rachkauskas for the sale of the building to them for \$989,000. Yekimov and Rachkauskas then sought investors. *Id.* Two groups were plaintiffs in the ensuing civil suit. “Group A” plaintiffs entered into a shareholder agreement with Yekimov and Rachkauskas to form a corporation, Riccobono Properties, Ltd., whose purpose was to purchase and manage the building involved in the transaction. Yekimov and Rachkauskas sold some of the shares they owned to the “Group B” plaintiffs. *Id.* at 515. Plaintiffs alleged that the purported flip/assignment from Bankin to Yekimov and Rachkauskas was a sham transaction and that they really bought the building directly from Equities for \$770,000. *Id.* The District Court granted defendants’ motion for summary judgment, holding that plaintiffs did not present enough evidence to support certain elements of their securities fraud and RICO claims and declined to exercise supplementary pendant jurisdiction over the state law claims. *Id.* at 514.

598. *Id.* at 521.

599. *Id.* For an example of an attorney who did play a role in the “conception, creation, and execution” of a fraudulent scheme, see *Tribune Co. v. Purcigliotti*, 869 F. Supp. 1076, 1096-99 (S.D.N.Y. 1994), which held that an attorney and a law firm, who “helped devise the fraudulent scheme, played an integral role in managing the

Khani argued that he “acted as no more than their attorney.”<sup>600</sup> The Second Circuit accepted his argument, and it held that Khani could not be liable under § 1962(c) because he did not pass the “operation or management test.”<sup>601</sup>

If the First Circuit is right in *Aetna*, and it is, the result in *Azzielli* cannot be justified. On the securities claim under Rule 10b-5<sup>602</sup> the Court expressly found that Khani met the civil securities aiding and abetting test then enforced in the Second Circuit: knowledge of the fraud and assistance in its perpetration.<sup>603</sup> The Court held: “a rational jury. . . could. . . [find that] Khani. . . [was] a knowing participant in a scheme to use Bankin as a straw man in order to conceal the true purchase price.” *Azzielli*<sup>604</sup> was, of course, decided before *Denver Bank*.<sup>605</sup> The

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scheme, and directed the others to act in furtherance of the scheme,” met the operation or management test of *Reves*. *Id.* at 1098-99 (citing *Azzielli*, 21 F.3d at 521).

600. *Id.*

601. *Id.* at 521. The district courts in the Second Circuit are reluctant to hold attorneys liable under § 1962(c). In *Biofeedtrac, Inc. v. Kolinor Optical Enters. & Consultants*, 832 F. Supp. 585 (E.D.N.Y. 1993), the District Court entered summary judgment in favor of an outside attorney, Kuehn, and dismissed a § 1962(c) claim against him. The plaintiff owned patents to vision training devices and entered into an agreement with Kolinor for Kolinor to distribute the product. Kuehn first met with the principals of Kolinor while he was an associate in a New York law firm; he then left the firm to establish his own practice, with Kolinor as his sole client. Kuehn soon became involved in an alleged fraud perpetrated on the plaintiff and he acted in furtherance of the scheme and with full knowledge of its extent and purpose. Despite this extensive and ongoing participation by an outside attorney in his only client's fraudulent activities, the court found that his role was still confined to providing legal advice and services to the alleged enterprise. Even though the attorney “intentionally assisted a scheme to defraud,” his actions still did not rise to the necessary level of participation under *Reves*. *Id.* at 592. See also *Mathon v. Marine Midland Bank, N.A.*, 875 F. Supp. 986, 995 (E.D.N.Y. 1995) (noting in dictum that “attorneys do not incur RICO liability for the traditional functions of providing legal advice and services”); *Morin v. Trupin*, 835 F. Supp. 126, 135 (S.D.N.Y. 1993) (defendant law firm performed various legal services for parties affiliated with RICO enterprise that facilitated the operation of the enterprise, and also directed principals of RICO enterprise to sign legal documents, but the district court ruled that such conduct fell short of “operation or management”); *Morin*, 832 F. Supp. at 98 (defendant law firm's providing of legal services to general partners and to limited real estate partnership did not constitute participation in the affairs of the corporate enterprises, even if defendants had substantial persuasive power to induce management to take certain actions). In a criminal prosecution in *United States v. Altman*, 820 F. Supp. 794 (S.D.N.Y. 1993), the significance of possible alternative pleading is brought out sharply. The district court dismissed an indictment against Altman, a lawyer appointed to a position of trust by the Surrogates Court of New York County, because the indictment failed to allege that Altman was an operator or manager of the enterprise, the Surrogates Court. Altman “looted an estate of which he was executor, a conservatorship for a mentally impaired man, and a receivership of an antique company.” *Id.* at 795. If the looted estate were identified as the enterprise, Altman would not have escaped criminal liability. Individuals and entities other than attorneys who are “outsiders” to the alleged enterprise may also escape liability. See *Amalgamated Bank of N.Y. v. Marsh*, 823 F. Supp. 209, 220 (S.D.N.Y. 1993) (corporation controlled by bank employee did not participate in operation or management of bank merely because the employee diverted funds into the corporation's account in the same bank); *Morin v. Trupin*, 823 F. Supp. 201, 208 (S.D.N.Y. 1993) (alleged “employee” was instead an independent contractor who maintained his own real estate business distinct from the co-defendant's organization, and “an outside defendant with no official position in the organization,” and thus, under *Reves*, was not subject to RICO liability).

602. Securities Exchange Act of 1934, § 10(b), 48 Stat. 881 (15 U.S.C. § 78 (b)) and Rule 10(b) promulgated under it, 17 CFR § 240.105-5 (1993).

603. 21 F.3d at 512 (citing *IIT Int'l Investment Trust v. Cornfeld*, 619 F.2d 909, 927 (2d Cir. 1980) (test) and *SEC v. Frank*, 388 F.2d 486, 489 (2d Cir. 1968) (“a lawyer has no privilege to assist” in a fraud)).

604. 21 F.3d 512 (2d Cir. 1994).

605. 114 S. Ct. 1439 (1994); see *supra* note 295 (discussion of the lack of aiding and abetting in securities).

Second Circuit cannot be faulted with not anticipating that thunderbolt from the Supreme Court. Nevertheless, its finding on securities fraud of aiding and abetting should have carried over to a similar finding of aiding and abetting under RICO.<sup>606</sup> The opinion gives no evidence that the parties argued the issue or that the Court considered the question. If the teaching of *Conley* is still good law—"a complaint should *not* be dismissed for a failure to state a claim unless it appears *beyond doubt* that the plaintiff can prove *no* set of facts in support of his claim which would entitle him to relief"<sup>607</sup>—summary judgment should not have been granted to the Khani as a matter of law.<sup>608</sup> The Court should have held that while Khani did not meet the *Reves* test as a principal in the first degree, the evidence was sufficient to raise a material question of fact that he was either a principle in the second degree, or a coconspirator, or both. Unfortunately, the court treated *Reves* as if it articulated a per se rule—no outsiders, accountants, or lawyers. Nothing in *Reves* warrants its treatment as a per se rule. The Second Circuit's initial foray into the development of post-*Reves* jurisprudence was a regrettable false start.

In *United States v. Thai*,<sup>609</sup> the second post-*Reves* decision in the Second Circuit, the district court's instructions to the jury were challenged on appeal as erroneous in light of *Reves*. The appeal involved several defendants who were convicted in district court of a series of crimes, including murder, robbery, and extortion, all in connection with their participation in the activities of a street gang,

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606. The tests for the two forms of aiding and abetting are different: knowledge plus substantial assistance and intent plus facilitation. See *supra* notes 154 *et. seq.* (criminal); 288 *et. seq.* (civil). That point is put to one side; the evidence was sufficient to find either standard met.

607. *Conley*, 355 U.S. at 45-46.

608. 21 F.3d at 522 ("Although Khanimaj be subject to liability under the securities law. . . , plaintiff failed to present evidence of a basis for holding him liable under RICO"). Militating against this argument is the general doctrine of waiver. See, e.g., *King v. Cooke*, 26 F.3d 720, 726 (7th Cir. 1994) (by making one argument (summary judgment was issued prematurely) appellant waived other argument (substantive error was made)); *Hartmann v. Prudential Ins. Co. of America*, 19 F.3d 1207, 1214 (7th Cir. 1993) (argument not raised in district court or appellate brief is waived). On the distinction between waiver (intentional relinquish of known right) and forfeiture (failure to make timely objection) and its consequences, see *United States v. Olano*, 113 S. Ct. 1770, 1776-77 (1993). Inflexibly applied, a doctrine of waiver or forfeiture cannot be squared in the Fed. R. of Civ. Proc. 1 ("construed to secure the just, speedy and inexpensive determination of every action) (emphasis added). See also *Roscoe Pound, Mechanical Jurisprudence*, 8 COL. L. REV. 605, 619 (1908) ("[P]rocedural conceptions, pursued for their own sake, . . . defeat the end of procedure and defeat the substance of the law. Every time a party goes out of court on a mere point of practice, substantive law suffers an injury."). Such doctrines are designed to process cases efficiently, not do justice between litigants. Courts ought to recognize freely that "exceptional circumstances" warrant reaching arguments that do fundamental justice between the parties. See *Hormel v. Helvering*, 212 U.S. 552, 557 (1941) ("[a] rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with the . . . rules of fundamental justice"); *Aetna Cas. Sur. Co. v. P.&B. Autobody*, 43 F.3d 1546, 1571 (1st Cir. 1994) (citing *Johnston v. Holiday Inn Inc.*, 595 F.2d 890, 894 (1st Cir. 1979) (so compelling as virtually to ensure success or that not considering them would be a miscarriage of justice). See, e.g., *Cesnik v. Edgewood Baptist Church*, 88 F.3d 902, (11th Cir.) (RICO; poorly drafted complain alleging fraud in adoptions; summary judgment granted; affirmed in part, reversed in part, with directions to permit repleading).

609. 29 F.3d 785 (2d Cir.), *cert. denied*, 115 S. Ct. 456 (1994).

"Born To Kill."<sup>610</sup> All of the defendants were convicted of participating and conspiring to participate in the affairs of an enterprise through a pattern of racketeering activity, in violation of § 1962(c) and (d).<sup>611</sup> Although the Court did not expressly identify the enterprise, its opinion indicates it was the street gang itself. The jury instructions<sup>612</sup> were challenged by defendant Quang, a gang member who participated in the conduct of BTK's affairs. While the record indicated that he was not at the bottom of the management chain,<sup>613</sup> he was also not the acknowledged leader of the gang.<sup>614</sup> This time—involving an insider, rather than an outsider—and criminal, not civil litigation—the court correctly analyzed *Reves*, where the Supreme Court "in the context of the RICO liability of an outside accounting firm," held that "the word 'participate' makes clear that RICO liability is not limited to those with primary responsibility,"<sup>615</sup> but declined to "decide . . . how far § 1962(c) extends down the ladder of operation."<sup>616</sup> Considering that one of the gang's robberies was Quang's idea, and that Quang committed this robbery with two other gang members without first obtaining the leader's approval, the Second Circuit appropriately held that "[w]ithout deciding how far down the ladder of operation § 1962(c) extends, we have no doubt it extends at least to Quang."<sup>617</sup> Citing the First Circuit's decision in *Weiner*,<sup>618</sup> the *Thai* court observed, "[i]n any event, we note that no defendant objected to the trial court's RICO instruction in this regard, and thus we would not reverse on account of any error in light of the later decided *Reves* unless it were plain

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610. The gang, known as Born to Kill ("BTK"), or the "Canal Boys," was an organized street gang composed almost entirely of young Vietnamese males, with its center of operation in New York City's Chinatown. The gang committed violent crimes, including robbery and extortion, and targeted Asian store owners, largely because of the gang's belief that such victims "don't know much about the law and they don't complain to the police." *Id.* at 795.

611. *Id.* at 794.

612. In its charge to the jury, the district court instructed the jury, in part, as follows:

The third element, which the government must prove beyond a reasonable doubt is that the defendant conducted or participated, directly or indirectly, in the affairs of the enterprise. The terms "conduct" and "participate in the affairs" of an enterprise include the performance of acts, functions, or duties that are necessary or helpful to the operation of the enterprise. A person may participate in the conduct of an enterprise even though he had no part in the management or control of the enterprise and no share in any profits.

*Thai*, 29 F.3d at 816.

613. *Id.*

614. Thai was BTK's leader from 1988 until his arrest in August 1991. He oversaw BTK's operations, planned many of its crimes, and collected the proceeds of its activities. Thai paid for the living expenses of the gang members and he disciplined those who were suspected of cooperating with the police or of keeping the proceeds from robberies. The robberies were usually planned by Thai, who selected the participants and the victims, planned the timing and manner of the robbery, and provided the weapons. *Id.* at 794.

615. *Id.* at 816 (citing *Reves*, 570 U.S. at 179).

616. *Id.* (citing *Reves*, 570 U.S. at 184 n.9).

617. *Id.*

618. *Weiner*, 3 F.3d at 24; see *supra* note 540.

error.”<sup>619</sup> No such error was found.

Jury instructions were again challenged on appeal in *Napoli v. United States*,<sup>620</sup> another criminal prosecution involving a large Manhattan law firm, Morris J. Eisen, P.C., which specialized in personal injury suits. The evidence at trial established that defendants<sup>621</sup> “conducted the affairs of the Eisen law firm through a pattern of mail fraud and witness bribery by pursuing counterfeit claims and using false witnesses in personal injury trials, and that the Eisen firm earned millions in contingency fees from personal injury suits involving fraud or bribery.”<sup>622</sup> Defendants were convicted, following a jury trial, of both § 1962(c) and § 1962(d) violations. On appeal, they claimed that the district court’s charge to the jury was incorrect in light of the Supreme Court’s subsequent *Reves* decision because the court told the jury “the prosecution is not required to prove that the defendant participated in the management or control of the enterprise.”<sup>623</sup> The Second Circuit assumed for purposes of the appeal that these instructions were erroneous, but it concluded that the defendant’s attorneys could not show that any error in the instructions resulted in a complete “miscarriage of justice.”<sup>624</sup> Citing

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619. 29 F.3d at 816.

620. 32 F.3d 31 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 900 (1995).

621. Defendants included Napoli and Fishman, two trial attorneys who were “Of Counsel” to the Eisen firm, and Gabe, Rella, and Weinstein, three private investigators affiliated with the firm that assisted with trial preparation. *Id.* at 33.

622. *Id.* at 33.

623. *Id.* at 34. The district court’s instructions to the jury concerning defendants’ substantive RICO violation were as follows:

[T]he prosecution must show that the defendant whose case you are considering knowingly and intentionally conducted or participated in the conduct of the affairs of the enterprise through a pattern of racketeering activity . . . . Simply put, the prosecution must prove that there is a meaningful connection between the pattern of racketeering and the affairs of the enterprise, that is, that the defendant knew of the existence of the enterprise and intended that its affairs be furthered by the defendant engaging in a pattern of racketeering activity . . . .

The prosecution is not required to prove that the defendant participated in the management or control of the enterprise. The prosecution is, however, required to prove that the defendant’s actions were related to the enterprise and that those acts were known to and were intended to further the affairs of the enterprise and did in fact further the affairs of the enterprise. The prosecution need not prove, as the statute indicates, that the defendant directly participated in the conduct of the affairs of the enterprise. It must prove, however, that the defendant either directly or indirectly conducted or participated in the conduct of the enterprise’s affairs through the pattern of racketeering activity.

*Id.* At the time this charge was given, it was correct under the Second Circuit’s decision in *United States v. Scotto*, 641 F.2d 47 (2d Cir.), *cert. denied*, 452 U.S. 961 (1981). See *supra* note 103 *et. seq.* (discussion of law at that time).

624. As a general rule, “relief is available under § 2255 only for a constitutional error, a lack of jurisdiction in the sentencing court, or an error of law that constitutes ‘a fundamental defect which inherently results in a complete miscarriage of justice.’ ” *Napoli*, 32 F.3d at 35 (quoting *Hardy v. United States*, 878 F.2d 94, 97 (2d Cir. 1989) (quoting *United States v. Addonizio*, 442 U.S. 178, 185 (1979) (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)))).

*Thai*,<sup>625</sup> in which the Second Circuit found evidence that defendant played some part in directing the affairs of the enterprise to be sufficient to reject the challenge to the jury instructions, the *Napoli* Court similarly applied a plain error analysis. Overwhelming evidence in the case was presented to the jury that Napoli and Fishman, the two attorney defendants, played a major part in directing the affairs of the enterprise, the Eisen law firm. Although Napoli and Fishman argued that they were no more than outside ("Of Counsel") attorneys to the Eisen firm, the Second Circuit found that "the evidence demonstrated that they were not merely providing peripheral advice but had participated in the core activities that constituted the affairs of the Eisen firm, namely, trying cases and obtaining settlements."<sup>626</sup> The Second Circuit concluded: "as attorneys for the Eisen law firm with primary responsibility for the actual litigation of lawsuits, Napoli and Fishman exercised a significant degree of direction over the affairs of the enterprise. Their role plainly involved participating in the control or management of the firm, within the definition of *Reves*."<sup>627</sup>

In *United States v. Viola*,<sup>628</sup> another criminal case, the defendants were convicted of violating and conspiring to violate RICO, through their involvement in a drug and stolen property importation and distribution ring.<sup>629</sup> Viola and the other defendants assisted narcotics dealers in importing drugs into the United States through the Brooklyn waterfront. One of the convicted defendants, Formisano, performed odd jobs for Viola, consisting mostly of maintenance and light clean-up work. On appeal, Formisano argued he did not participate in the operation or management of the RICO enterprise;<sup>630</sup> he also argued that the government did not prove knowledge of the RICO conspiracy sufficient to convict him under § 1962(d).<sup>631</sup> In *Viola*, the district court instructed the jury in accordance with *United States v. Scotto*,<sup>632</sup> which was overruled by *Reves*. The jury instructions

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625. 29 F.3d 785 (2d Cir.), *cert. denied*, 115 S.Ct. 456 (1994).

626. *Napoli*, 32 F.3d at 36. Moreover, the court found that in several cases Napoli and Fishman "discharged their responsibility through a pattern of illegal acts." *Id.* The jury found that Napoli procured false testimony through bribery, fabricated testimony for witnesses at trial and suborned perjury. Fishman was found guilty of bribing witnesses, committing mail fraud and instructing witnesses to testify falsely. *Id.*

627. *Id.* Since the defendants met the *Reves* test as principals in the first degree, the court cannot be faulted with not examining aid and abetting or conspiracy theory; the facts, however, were sufficient to meet either or both of these two alternative theories of liability. *See also* *Adler v. Berg Harmon Assocs.*, 816 F. Supp. 919, 929 (S.D.N.Y. 1993) (because defendant was one of the primary decision-makers for the corporate enterprise and supervised the drafting of the allegedly fraudulent private placement memoranda, he managed the operations of the alleged RICO enterprise, thereby satisfying *Reves*).

628. 35 F.3d 37 (2d Cir. 1994), *cert. denied*, 115 S.Ct. 1270 (1995).

629. *Id.* The trial and convictions arose out of "an investigation of criminal activity on the Brooklyn, New York waterfront that uncovered a scheme by defendant Anthony Viola to use his influence to facilitate the importation of cocaine and marijuana into the country, and to steal goods from the pier and adjacent warehouses and then sell them." *Id.*

630. *Id.* at 40.

631. *Id.*

632. 641 F.2d 47 (2d Cir.), *cert. denied*, 452 U.S. 961 (1981).

stated that “[a] person may participate in the conduct of an enterprise even though he had no part in the management or control of the enterprise and no share in any profits.”<sup>633</sup> The Second Circuit appropriately determined that “since *Reves*, it is plain that the simple taking of directions and performance of tasks that are ‘necessary or helpful’ to the enterprise, without more, is insufficient to bring a defendant within the scope of § 1962(c).”<sup>634</sup> Accordingly, the jury instructions were found to be erroneous, because they could not be reconciled with the *Reves* requirement that the defendant possess “some part in directing the enterprise’s affairs.”<sup>635</sup> Nevertheless, because Formisano did not object to the instructions at trial, the Second Circuit examined them under the plain error standard.<sup>636</sup> The proof at trial as to Formisano showed that “acting under Viola’s instructions, he had transported some stolen beer and lamps to buyers and returned most of the proceeds from the sales to Viola.”<sup>637</sup> While Viola and the other defendants decided how to remove the drugs from the docks and to whom to sell the stolen goods, Formisano was “not consulted in the decision-making process and exercised no discretion in carrying out Viola’s orders.”<sup>638</sup> The Second Circuit contrasted these facts with its earlier decision in *Thai*, where the defendant conceived of and performed racketeering acts without prior approval; it then concluded that

while Formisano’s acts might have contributed to the success of the RICO enterprise, he simply did not come within the circle of people who operated or managed the enterprise’s affairs. *Reves* still attaches liability to those down the ‘ladder of operation’ who nonetheless played some management role, it is plain to us that, since *Reves*, § 1962(c) liability cannot cover Formisano. Formisano was not on the ladder at all, but rather, as Viola’s janitor and handyman, was

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633. *Viola*, 35 F.3d at 41. The jury instructions stated:

The third element that the government must prove is that the defendant conducted or participated in the affairs of the enterprise. The terms conduct and participate in the conduct of an enterprise include the performance of acts, functions or duties that are necessary or helpful to the operation of the enterprise. A person may participate in the conduct of an enterprise even though he had no part in the management or control of the enterprise and no share in any profits. But the participation must be willful and knowing.

*Id.* at 40.

634. *Id.* *Viola* contains imprecise language. When Judge Walker paraphrased *Reves*, he observed that “[u]nder the Court’s interpretation, simple aiding and abetting a violation is not sufficient to trigger liability. . . .” 35 F.3d at 40-41. Here, too, Judge Walker made an unfortunate reference to *Denver Bank*. *Id.* This paraphrase and the reference are potentially misleading. The Supreme Court in *Reves* rejected simple aiding and abetting *some* aspect of a violation; it did not reject aiding and abetting *any* aspect of a violation. See 507 U.S. at 178-79. *Reves*, in short, did not reject aiding and abetting the management or operation of an enterprise.

635. *Id.*

636. Generally, plain error review under FED. R. CRIM. PRO. 52(b) puts the burden of persuasion of prejudice on the defendant. Because of the “special circumstances” of *Reves* in overturning settled precedent, the Second Circuit applied a modified the plain error rule and placed the burden of persuasion on the government to prove that no prejudice occurred to the defendant. *Id.* at 42.

637. *Id.*

638. *Id.*

sweeping up the floor underneath it.<sup>639</sup>

Accordingly, the court concluded that the jury instructions were plain error. Concerning § 1962(d), the Second Circuit first appropriately commented in dicta that the reversal of Formisano's substantive RICO conviction did not require automatic reversal of his RICO conspiracy provision because a defendant may be guilty of conspiring to violate a law, even if he is not among the class of persons who may commit the crime directly.<sup>640</sup> The court observed: "the RICO conspiracy charge is proven if the defendant 'embraced the objective of the alleged conspiracy,' and agreed to commit two predicate acts in furtherance thereof."<sup>641</sup> The court also acknowledged that Formisano committed two crimes that qualified as predicate RICO acts; it then phrased the issue presented as "whether the government produced sufficient evidence to convince a jury beyond a reasonable doubt that Formisano knowingly associated with the Viola enterprise by agreeing to commit the predicate acts."<sup>642</sup> It held that it was sufficient for the government to show "that the defendant know[s] the general nature of the enterprise, and know[s] that the enterprise extends beyond his individual role."<sup>643</sup> At trial, the government, however, established only that Formisano was employed by Viola to perform menial tasks and that he had agreed on two occasions to sell goods for Viola, knowing they were stolen. According to the court, "the record . . . [was] devoid of evidence that, despite stolen property crimes he committed, Formisano *knew* what Viola and the other members of the conspiracy were up to."<sup>644</sup> Nothing about the transactions or the stolen goods would necessarily lead Formisano to suspect he was part of a larger enterprise. Accordingly, the Second Circuit appropriately concluded that the evidence was insufficient to sustain Viola's conviction under § 1962(d).<sup>645</sup>

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639. *Id.* at 43 ("There was no evidence that he was even aware of the broader enterprise").

640. *Id.* at 43 (citing *United States v. Quintanilla*, 2 F.3d 1469, 1485 (7th Cir. 1993)). See *supra* note 358 *et. seq.* (discussion of general rule) and *infra* note 795 (discussion of *Quintanilla*). "Appropriately" is used advisedly. While Formisano could not be a principal in the first degree because he was not a manager or an operator, he could have been an aider and abettor of the management or operation had he had the appropriate state of mind, even though he did not fall within the class of persons who violate § 1962(c) as a principal in the first degree. See *supra* note 204 *et. seq.* (discussion of general rule and exceptions). Judge Walker's subsequent decision of the point under § 1962(d) was equally relevant to liability under § 1962(c) under 18 U.S.C. § 2. Judge Walker was mistakenly thinking of *Reves* as a *per se* rule, although this time, the facts involved an insider rather than an outsider.

641. *Viola*, 35 F.3d at 43 (citing *United States v. Neapolitan*, 791 F.2d 489, 499 (7th Cir.), *cert. denied*, 479 U.S. 940 (1986)).

642. *Id.* at 44 (emphasis added) (citing *United States v. Rastelli*, 870 F.2d 822, 828 (2d Cir.) *cert. denied*, 493 U.S. 982 (1989)).

643. *Id.* at 43. This requirement stems from the elementary principle of conspiracy law that a person cannot be convicted of agreeing to participate in a conspiracy if he possesses no knowledge the conspiracy even exists. *Id.* See *supra* note 342 *et. seq.* (discussion of general rule).

644. *Viola*, 35 F.3d at 44 (emphasis added).

645. *Id.*



In *United States v. Wong*,<sup>646</sup> the next RICO criminal appeal involving *Reves*, defendants were charged with membership in a racketeering enterprise known as the "Green Dragons," a violent street gang that was principally located in the Chinese section of Queens, New York. The Green Dragons extorted "protection money" from Chinese-run businesses; the enterprise was also involved in assault, murder, kidnapping, and other crimes employed to defend its turf.<sup>647</sup> The defendants were convicted of violating § 1962(c) and (d) of RICO.<sup>648</sup> Two defendants, gang members Wang and Ngo, argued on appeal that in light of *Reves*, which had been decided between the trial and their appeal, the district court's erroneous jury instructions concerning the "pattern" element of § 1962(c) required a reversal. In addition, they contended that the evidence was insufficient to convict them under the *Reves* standard under §§ 1962(c) and 1962(d).<sup>649</sup> Commenting that the jury instructions<sup>650</sup> used by the district court on the "conduct" element of § 1962 were "vulnerable" because they were based on *Scotto*,<sup>651</sup> the court, nonetheless, determined that "the convictions . . . should be affirmed whether normal plain error analysis or the *Viola* 'modified plain error' rule . . . was applied."<sup>652</sup> The court, appropriately reasoned, however, that defendants were intimately involved in the criminal activities of the Green Dragons; *Reves*, too, held that a defendant could act under the direction of superiors in a RICO enterprise and still "participate" in the enterprise within the meaning of § 1962(c).<sup>653</sup> The court compared *Wong* to *Viola*, where the acquitted defendant was not aware of the overall criminal activities of the RICO enterprise.<sup>654</sup> Here, the court noted, defendants "were thoroughly indoctrinated participants" of the Green Dragons.<sup>655</sup> Not only were

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646. 40 F.3d 1347 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 2568 (1995).

647. *Id.* at 1355.

648. *Id.* at 1356.

649. *Id.*

650. The jury instructions stated:

This requires proof that there is a meaningful connection between the defendant's illegal acts and the affairs of the enterprise. The government is not required to prove that the defendant participated in the management or control of the enterprise or that he shared in its profits. The government is, however, required to prove that the defendant knowingly and intentionally engaged in racketeering acts in some way related to the affairs of the enterprise or that the defendant was able to commit the racketeering acts solely by virtue of his position or involvement in the affairs of the enterprise.

*Id.* at 1372.

651. *Id.* See *Scotto*, where the Second Circuit stated:

We think that one conducts the activities of an enterprise through a pattern of racketeering when (1) one is enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise, or (2) the predicate offenses are related to the activities of that enterprise.

*Scotto*, 641 F.2d at 54.

652. *Wong*, 40 F.3d at 1373 (citing *Viola*, 35 F.3d at 42).

653. *Id.* (citing *Reves*, 507 U.S. at 184-85 & n.9).

654. *Viola*, 35 F.3d at 43.

655. *Wong*, 40 F.3d at 1374.

they found to have committed a wide range of predicate acts, but their activities were at the core of the conduct of the Green Dragons.<sup>656</sup> Accordingly, the court affirmed the convictions, holding that "in view of this intensive and continuing involvement in the operations of the Green Dragons, ordinarily (as in the case of most criminal organizations) under the overall direction of the enterprise's leadership, we perceive no miscarriage of justice in the RICO convictions in this case."<sup>657</sup>

On a rehearing of *Napoli v. United States*,<sup>658</sup> the defendants who were private investigators for the Eisen law firm and who assisted the firm's attorneys in preparing cases involving fabricated evidence and false witnesses challenged the trial court's instruction to the jury that "the prosecution is not required to prove that the defendant participated in the management or control of the RICO enterprise."<sup>659</sup> Once again, the Second Circuit appropriately rejected the challenge, finding no plain error in the instructions. The court argued that "of significant importance to our ultimate determination in this case is the following statement in *Reves*:

We agree that liability under § 1962(c) is not limited to upper management, but we disagree that the 'operation or management' test is inconsistent with this proposition. "An enterprise is 'operated' not just by upper management but also by lower-rung participants in the enterprise who are under the direction of upper management."<sup>660</sup>

Based on this language in *Reves*, the Second Circuit found "no difficulty in finding that [defendants] were 'lower-rung participants' whose activities were conducted 'under the direction of upper management.'" <sup>661</sup> The managers, the court reasoned, were the lawyers who litigated and settled the fraudulent lawsuits; defendants were the investigators who assisted the lawyers in conducting the enterprise;<sup>662</sup> they were, therefore, "involved in playing a part in the affairs of the enterprise within the meaning of *Reves*."<sup>663</sup>

In *United States v. Masotto*,<sup>664</sup> the defendant, an alleged associate of the

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656. *Id.*

657. *Id.* The court did not separately consider the issue of aiding and abetting or conspiracy. The defendants went down as principals in the first degree and coconspirators who occupied the class of persons who, in fact, could be principals in the first degree.

658. 45 F.3d 680 (2d Cir.), *cert. denied*, 115 S.Ct. 1796 (1995).

659. *Id.* at 681. See *supra* note 620 *et. seq.* (discussion of *Napoli*).

660. *Napoli*, 45 F.3d at 683 (quoting *Reves*, 507 U.S. at 184).

661. *Id.*

662. Thus, defendant Gabe carried out instructions with broad discretion to bribe a witness, coach witnesses to testify falsely and fabricate evidence. Weinstein also bribed and coached witnesses. The Second Circuit found both Gabe and Weinstein to be "high up on the ladder of operation." *Id.*

663. *Id.* As in *Thai and Wong*, the defendants, therefore, went down as principals in the first degree and coconspirators of the same class. Neither aiding and abetting nor conspiracy was separately discussed.

664. 73 F.3d 1233 (2d Cir. 1996).

Gambino Organized Crime Family of La Cosa Nostra, was convicted of violating both the substantive (§ 1962(c)) and conspiracy (§ 1962(d)) provisions of RICO.<sup>665</sup> In light of *Thai* and *Wong*, the result in *Masotto* was foreordained. On appeal, Masotto successfully claimed that “the jury instruction on the elements of RICO [was] erroneous because it failed to include the ‘operation or management’ language from the Supreme Court’s decision in *Reves*.”<sup>666</sup> Reviewing the merits of his argument, the Second Circuit stated that the “operation or management” test of *Reves* was adopted to determine whether “a defendant had a sufficient connection to an enterprise to warrant imposing liability.”<sup>667</sup> The district court’s instructions to the jury, addressing the “conduct” language of § 1962(c), required the government to prove “that there was a meaningful connection between the unlawful or racketeering acts of the defendant and the affairs of the enterprise.”<sup>668</sup> The Second Circuit then agreed that these instructions did not comport with the requirements of *Reves*. The instruction required only that the “racketeering act was ‘in some way related to the activities of the enterprise’ or that the defendant was enabled to commit the acts only by reason of his involvement or position in the enterprise.”<sup>669</sup> Since the district court failed to explain that the defendant must participate in the “operation or management” of the enterprise, the instruction was erroneous.<sup>670</sup> Nevertheless, the Second Circuit did not order a new trial because it found the error to be harmless. The government contended at the trial that Masotto was the leader of the crew, and this question of fact became the “crux of the entire case.”<sup>671</sup> The jury only could have found that Masotto was the leader of the crew or not a crew member at all. Given this choice, the jury instructions were harmless, because “the jury only could have found Masotto guilty based upon his leadership and management of the crew.”<sup>672</sup> Masotto, as could be expected, lost his appeal.

The most recent Second Circuit case involving *Reves* is *United States v. Workman*,<sup>673</sup> which involved a Buffalo based street gang known as the “L.A. Boys,” which used violence, kidnapping, drive-by shootings, and murder to support its primary objective of narcotics trafficking.<sup>674</sup> Here, too, the result of the appeal was foreordained by the Second Circuit’s previous decisions. Three defendants appealed their convictions on various charges ranging from racketeer-

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665. *Id.* The defendant formed a crew (the “crew”), with himself as the leader, for the purpose of profiting from a variety of crimes. Since Masotto was a member of the Gambino family, he was able to protect the crew from competing crime organizations, and he was able to create a network for the distribution of the proceeds of the crimes.

666. *Id.*

667. *Id.* at 1238.

668. *Id.*

669. *Id.*

670. *Id.*

671. *Id.* at 1239.

672. *Id.*

673. 80 F.3d 688 (2d Cir. 1996).

674. *Id.* at 692.

ing and narcotics conspiracy to illegally using a telephone to facilitate narcotics transactions. More specifically, two of the three defendants, Jamison and Rodgers, appealed their RICO convictions on the grounds the jury instructions were not consistent with the *Reves*' requirement that the defendant have "some part in directing the enterprise's affairs."<sup>675</sup> While the Second Circuit agreed with Jamison and Rodgers that instructions should have included the *Reves* language, the defendants' failure to raise a timely objection to the charge at trial excluded anything but a plain error review by the court.<sup>676</sup>

Even though the district court departed from *Reves*, the Second Circuit did not find "plain error" in the instructions.<sup>677</sup> The court concluded that the defendants still were required to show that the error was prejudicial. Additionally, the court noted "a jury instruction which omits an element of the offense does not warrant reversal if the element was proven by overwhelming evidence."<sup>678</sup> The Second Circuit recognized that, despite the erroneous jury instructions, the government presented "overwhelming" evidence that both Jamison and Rodgers were involved in the management of the L.A. Boys' drug enterprise.<sup>679</sup> Jamison was identified as an intermediary for lower-level drug dealers; he was also in charge of picking up shipments of drugs and collecting the proceeds of consignment sales. Jamison was also involved in numerous murders and other violent acts to support the activities of the enterprise.<sup>680</sup> The Second Circuit termed this "powerful evidence" showing that Jamison was involved in the management of the enterprise and that the erroneous jury instruction was "not prejudicial and did not constitute plain error as to him."<sup>681</sup> Similarly, Rodgers was involved in the planning of several murders, and he attended meetings designated only for "captains" of the L.A. Boys; he also operated as a major street level dealer for the enterprise.<sup>682</sup> The court found, therefore, that Rodger's deep involvement in both the gang's narcotics

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675. *Id.* at 696. (quoting *Reves*, 507 U.S. at 179).

676. *Id.* at 695-96. The Court explained that *United States v. Olano*, 507 U.S. 725 (1993) sets out the major test for the plain error rule. This inquiry was summarized in *United States v. Viola*:

Rule 52(b) places three limits on appellate authority to review errors not preserved at trial. First, there must be "error," or deviation from a legal rule which has not been waived. Second, the error must be "plain," which at a minimum means "clear under current law." Third, the plain error must, as the text of Rule 52(b) indicates, "affect[ ] substantial rights," which normally requires a showing of prejudice.

35 F.3d 37, 41 (2d. Cir. 1994), *cert. denied*, 115 S.Ct. 1270 (1995).

677. *Workman*, 80 F.3d at 696.

678. *Id.* at 697 (quoting *Napoli v. United States*, 32 F.3d 31, 36 (2d. Cir. 1994), *cert. denied*, 115 S.Ct. 900 (1995)).

679. *Id.* at 697.

680. *Id.*

681. *Id.* The Court noted the similarity between its analysis here and the reasoning in *United States v. Wong*, 40 F.3d 1347, 1374 (2d Cir. 1994), *cert. denied*, 115 S.Ct. 1968 (1995), where it found that no plain error in a deficient *Reves* instruction, where defendants planned and carried out several murders under the direction of the leadership of a robbery and extortion enterprise.

682. *Id.* at 697-98.

distribution and murder conspiracy "placed him at a sufficiently high level in the enterprise to constitute involvement in the organization's 'operation or management' under § 1962 (c)." <sup>683</sup>

#### D. The Third Circuit

The post-*Reves* jurisprudence of the Third Circuit is a mitigated misadventure. Its first foray fell into misreading *Reves* as a per se exclusion for outsiders. Here, too, the court is mistakenly moving toward the creation of a safe harbor for outsiders. Its second foray corrected one mistake, a misapplication of the enterprise-person rule to exclude officers and employers of an enterprise from personal liability, but made another equally serious misstep, creating by dicta a rule precluding enterprises from being victims, although it appropriately recognized, like the First Circuit, aider and abettor liability under RICO. Its third foray got the result right on RICO conspiracy, but unfortunately offered misguided dicta on the scope of RICO conspiracy. The circuit needs, in short, to rethink its first three false starts.

*Reves* was unthinkingly applied inflexibly by the Third Circuit in its first post-*Reves* decision, *University of Maryland at Baltimore v. Peat, Marwick, Main*

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683. *Id.* at 698. Another recent Second Circuit court decision citing *Reves* is *S.E.C. v. Salomon Inc.*, 78 F.3d 802 (2d Cir. 1996). *Salomon* involves the distribution of funds from a settlement fund that was established by the brokerage firm to settle civil claims stemming from a securities fraud judgment. At issue was whether a Salomon employee, who was alleged to have knowledge of the illegal trades and dealings, was eligible for a share of the settlement fund. Employees who participated in the illegal scheme were to be precluded from the plaintiff class and exempt from settlement. Rosenfeld, the employee who had been ruled ineligible for settlement by the district court, argued that knowledge of an illegal act should not qualify as "participation"; rather, he contended the Second Circuit has construed "participation" to mean "affirmative action on the part of a person and not merely awareness of the action of others." *Id.* at 805. See *United States v. Heinemann*, 801 F.2d 86, 93-84 (2d Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987); *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (holding that "a defendant must 'participate in [the crime] as in something that he wishes to bring about, that he seek by his action to make it succeed.'") *Id.* at 805. *Salomon* cites *Reves* to support the proposition that "participate" as used in 18 U.S.C. § 1962(c) means that a person takes "some part in directing the enterprise's affairs." *Id.* at 806. The court noted that "[a]lthough the term 'participation' may mean more than knowledge, we think that knowledge, combined with the reviews and conversations Rosenfeld had with Mozer, could constitute 'participation.'"

*Id.* at 805. The Second Circuit held that the Fund Administrator did not have sufficient evidence to show Rosenfeld knew of improper trading and vacated the judgment of the district court. For other district court cases within the Second Circuit on *Reves*, see *Jerry Krubecka, Inc. v. Avellino*, 898 F. Supp. 963 (E.D.N.Y. 1995) (holding that "when an agent such as [the defendant] operates and controls the corporations and takes part in the direction of the enterprise on behalf of the corporations, those corporations may be said to have had some part in its direction."); *131 Main Street Assoc. v. Manko*, 897 F. Supp. 1507 (S.D.N.Y. 1995) (holding that while

the operation-or-management rule is intended to spare from RICO liability true enterprise outsiders. . . it is [not] so narrow as to spare the kind of key, if passive, insiders that [the defendant's] are alleged to be. . . They allegedly enabled the partnerships to function effectively by providing their own company as the partnership's corporate trading partner. . . [and] in doing so, they helped determine the enterprise's modus operandi, and can be said to have 'managed' its basic structure.).

& Co.<sup>684</sup> Peat Marwick was the independent auditor for Mutual Fire from 1979-84; in that capacity, it issued unqualified auditor's opinions on Mutual Fire's financial statements. The audit opinions "informed the public that Peat Marwick had a reasonable basis for concluding that Mutual Fire's financial statements were accurate and that Mutual Fire was well financed."<sup>685</sup> Unfortunately for policyholders and investors who relied on Peat Marwick's opinions, the financial statements were, in fact, "false and misleading."<sup>686</sup> Indeed, Peat Marwick "ignored numerous signs of Mutual Fire's precarious financial condition and had no reasonable basis to issue the unqualified opinions."<sup>687</sup> Mutual Fire went into statutory rehabilitation when it became insolvent and it could no longer pay claims. Various policyholders and investors filed a civil RICO action against Peat Marwick alleging that it conducted the affairs of Mutual Fire through a pattern of racketeering activity. The Third Circuit affirmed the district court's dismissal of the RICO claim, which did not rely on *Reves*, against Peat Marwick on different grounds: "*Reves v. Ernst & Young* is dispositive."<sup>688</sup> The Third Circuit merely echoed *Reves* when it commented that the "operate or manage" test expressed "the element of direction in an easy-to-apply formula," but the court grossly mischaracterized the facts of *Reves* and their meaning:

Under this test, not even action involving some degree of decision making constitutes participation in the affairs of an enterprise. The accounting firm in *Reves* made a critical, erroneous decision that affected on the solvency of the co-op and did not tell the board of directors about it, thus prompting the dissent to characterize the firm as "functioning as the Co-op's *de facto* chief financial officer." Yet even this decision making did not rise to the level of directing an enterprise.<sup>689</sup>

So stated, *Reves* becomes an unjustifiable virtual per se grant of immunity for accountants and other outsiders.<sup>690</sup>

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684. 1996 F.2d 1534 (3d Cir. 1993).

685. *Id.* at 1538.

686. *Id.*

687. *Id.*

688. *Id.* This conclusion is hardly correct—unless aiding and abetting and conspiracy liability under RICO were eliminated by *Reves*. They were not: *Reves* offered guidance; it was not "dispositive."

689. *Id.*

690. Not surprisingly, district courts in the Third Circuit follow the unfortunate lead of *University of Maryland*. In *Philadelphia Reserve Supply Co. v. Nowalk & Assocs.*, 864 F. Supp. 1456 (E.D. Pa. 1994), for example, the district court, citing *University of Maryland*, stated that "when an accounting firm performs audits, issues opinions, attends board of director meetings, and provides other accounting and consulting services to the alleged corporate enterprise, it does not 'conduct or participate' in the corporate enterprise's affairs sufficiently to support RICO liability under 18 U.S.C. § 1962(c)." 864 F. Supp. at 1472. The district court found, however, that defendants took action that went well beyond the normal provision of accounting services by formulating and adopting a formal policy for the rapid purchase of inventory by a corporation with increasing indebtedness. Similarly, in *In re Phar-Mor, Inc. Sec. Litig.*, 893 F. Supp. 484 (W.D. Pa. 1995), Chief Judge Ziegler held that an accounting firm (Coopers & Lybrand) did not "participate" in the affairs of its audit client (Phar-Mor) and, thus, Coopers & Lybrand was not liable to the plaintiff creditors, who allegedly extended credit and made loans to

Contrary to the Third Circuit's mischaracterization of the *Reves* facts, no mention is made in the Supreme Court's majority opinion in *Reves* that the accounting firm "functioning as the Co-op's *de facto* chief financial officer." In fact, Justice Souter's dissent stated that the majority opinion so narrowly construed the record that he said, "even if I were to adopt the majority's view of Section 1962(c), however, I still could not join the judgment, which seems to me unsupportable under the very 'operation or management' test the Court announces."<sup>691</sup> Nevertheless, in *University of Maryland*, the Third Circuit still improperly affirmed the district court's dismissal of the complaint, concluding, without more, "[w]e see no reason why we should not apply the *Reves* test on a motion to dismiss."<sup>692</sup> While the court's statement is, of course, correct, as a

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Phar-Mor in reliance on Coopers & Lybrand's allegedly negligent audits. The district court stated that it found no evidence that Coopers & Lybrand was in any way engaged in Phar-Mor's "operation or management," or that the accounting firm had knowingly directed or engaged in fraudulent activity. *Id.* at 487-88. *But see* *United States v. Bertoli*, 854 F. Supp. 975, 1011 (D.N.J. 1994) (where indictment contained sufficient allegations that defendant participated, directly or indirectly, in the operation or management of the RICO enterprise, a brokerage firm, by directing the trading of various securities through that enterprise and engaging in fraudulent securities trading practices); *United Nat'l Ins. Co. v. Equipment Ins. Mgrs.*, Civil Action No. 95-0116, 1995 U.S. Dist. LEXIS 15868, at \*17 (E.D. Pa. Oct. 27, 1995) (where plaintiffs alleged that defendants "managed a key aspect of the enterprise's business activity: the issuance of crane insurance and the collection of audit premiums related thereto," the standard for liability under § 1962(c) was met).

691. *Reves*, 507 U.S. at 189 (Souter, J., dissenting).

692. *University of Maryland*, 996 F.2d at 1539. In *Gilmore v. Berg*, 820 F. Supp. 179 (D.N.J. 1993), an attorney and an accountant who drafted allegedly misleading tax opinion and forecast letters for a corporate entity were also found not to have participated in the operation or management of any of the corporate entities involved because their actions "merely constituted the rendition of professional services . . . to the corporate entities . . . [s]uch conduct does not constitute participation in the direction of the affairs of any of the corporate entities involved." *Id.* at 182-83. Similarly, in *Fidelity Federal Sav. & Loan Ass'n v. Felicetti*, 830 F. Supp. 257 (E.D. Pa. 1993), defendants prepared misleading and fraudulent real estate appraisals upon which plaintiffs based their decisions to extend certain loans. Plaintiffs claimed that the appraisals were the keystone to the corporate enterprise's board's decision to grant the various loan requests; the district court determined that *Reves* mandated that "even where the wrongdoers provide misleading or fraudulent information which significantly influences a major decision of the enterprise, this still does not constitute 'operation or management' of the enterprise in order for § 1962(c) liability to attach." *Id.* at 260. The court disregarded the evidence that defendants engaged in an independent review of the properties involved in the loans and did not base their appraisals on information provided by the enterprise, as had occurred in *Reves*. The submission of misleading and fraudulent appraisals that were performed with complete independence from the enterprise still did not rise to the level of operating or managing the enterprise. The *Fidelity* court, however, also considered the impact of *Reves* on aider and abetter RICO liability, and it appropriately rejected the argument that "the *Reves* decision implicitly and explicitly makes aider and abetter liability inconsistent with § 1962(c) liability and the 'operation or management test.'" *Id.* at 261. It properly found that the portion of the *Reves* decision that refers to aiding and abetting "is limited to the [*Reves*] Court's attempt to define the word 'participate' as it is used in the RICO statute and is not dispositive of the [defendant's] argument." *Id.* The court then concluded that the *Reves* holding did not "alter the nature of RICO to such an extent as to warrant the implicit reversal of the *Petro-Tech* holding." *Id.* *But see* *Rolo v. City Investing Co. Liquidating Trust*, 845 F. Supp. 182, 232 (D.N.J. 1993) (stating that

"In sum, a defendant may be liable for aiding and abetting under § 1962(c) (*i.e.*, be liable without actually having committed at least two predicate acts as required by the statute) only if that defendant has both (1) aided and abetted the commission of at least two predicate acts (as required by *Petro-Tech*) and (2) participated in the operation or management of the enterprise (as required by *Reves*)"),

matter of general law, no reason is given in the court's opinion why *Conley* did not require the court to consider the liability of Peat Marwick under RICO, if not as a principal in the first degree in the management or operation of the University, on the court's reading of the record, then at least under some alternative theory. If it is appropriate to consider an appeal on the basis of a decision handed down on April 19, 1993, between the date of the judgment by the district court on other grounds and the argument before the court of appeals on May 4, 1993 on *Reves*, as it was, plaintiffs ought, at the same time, to be given an opportunity to reformulate their complaint in light of that new precedent rather than find themselves summarily thrown out of court. Justice requires no less. The record on the appeal, in short, hardly established if alternative theories were considered: "beyond doubt that plaintiff[s] [could] prove no set of facts in support of. . . [their] claim which would entitle. . . [them] to relief."<sup>693</sup> In fact, if the allegation of "enterprise" is shifted from the University to Peat Marwick, the *Reves* test itself, as well as the other elements of RICO, is met. The appeal, therefore, should have been remanded to the district court with directions to permit the filing of an appropriate amendment to the complaint.<sup>694</sup> *University of Maryland*, in short, was wrongly decided.

In *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*,<sup>695</sup> the Third Circuit considered *Reves* again, but this time handed down a thoughtful and discriminating opinion. Nonetheless, the opinion contains unfortunate dicta precluding an enterprise from being a victim. The Royal Oaks car dealership, through the actions of its employees, perpetrated a widespread scheme to "defraud Jaguar through the submission of thousands of fraudulent warranty claims."<sup>696</sup> "[W]arranty claims were continuously submitted to Jaguar for the cost of . . . alleged repairs that were either unnecessary, were never actually performed, or were performed on cars that were no longer under warranty."<sup>697</sup> Fictitious timesheets, doctored paperwork and new car parts altered to look old were also part of this scheme.

In total, Royal Oaks defrauded Jaguar in an amount of between one and two million dollars, enabling Royal Oaks to generate hundreds of thousands of dollars of warranty income per month and to maintain extremely lucrative salaries for the defendants through periods of declining sales income even though its work bays were often empty and its technicians idle.<sup>698</sup>

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*aff'd*, 43 F.3d 1462 (3d Cir. 1994), *vacated without op.*, 66 F.3d 312 (3d Cir. 1994). The complaint in *Rolo* was again dismissed after remand, despite *Jaguar's Cars Inc. v. Royal Oak Motor Car Co.*, 897 F. Supp. 826, 827 (E.D. Pa. 1995). *Rolo II* is wrongly decided; it, too, should be reversed when it reaches the Court of Appeals the second time.

693. *Conley*, 355 U.S. at 45-46.

694. *Cf. Emery v. American General Finances Inc.*, 71 F.3d 1343, 1348 (7th Cir. 1995); (dismissed RICO suit; reversed; leave to amend suit warranted); *Warner v. Alexander Grant & Co.*, 828 F.2d 1528, 1531 (11th Cir. 1987) (dismissed RICO suit; reversed; leave to amend warranted).

695. 46 F.3d 258 (3d Cir. 1995).

696. *Id.* at 261.

697. *Id.*

698. *Id.*



After discovering the fraud and terminating the dealership,<sup>699</sup> Jaguar brought suit for violations of §§ 1962(c) and (d) of RICO. Defendants included Theodore Forhecz, Sr., the president and 51% owner of Royal Oaks, and his two sons, Mark and Theodore, Jr., who owned the other 49% of the dealership.<sup>700</sup> Following a verdict in favor of Jaguar,<sup>701</sup> defendants maintained on appeal that Jaguar's RICO claims "were legally insufficient in that Jaguar failed to allege a violation of § 1962(c) by 'persons' operating or managing a distinct 'enterprise.'" <sup>702</sup> The Third Circuit commented that it was uncontested that "Royal Oaks conducted a 'pattern of racketeering activity' that affected interstate commerce."<sup>703</sup> Given the requirement under § 1962(c) of conduct by a "person employed by or associated with any enterprise," the first issue on appeal was phrased as whether Jaguar "alleged activity by both a person and an enterprise."<sup>704</sup> Reviewing Third Circuit precedent on the person-enterprise rule of § 1962(c), the court proceeded to modify it in light of *Reves*, a welcome change in the law. Under the Third Circuit's previous interpretation of § 1962(c), as first reflected in *Glessner v. Kenny*,<sup>705</sup> "Jaguar's RICO claims would fail unless Royal Oaks was either (1) the victim of the defendant's scheme, or (2) a passive tool through which the scheme was conducted."<sup>706</sup> The court then held that it was "inconceivable that Royal Oaks could be viewed as the victim of the defendant's racketeering activity, since Jaguar alleges that Royal Oaks is the enterprise through which the defendants conducted their racketeering activity."<sup>707</sup> Further, the court interpreted the "passive tool" requirement to be limited in application to "those circumstances where infiltrating

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699. In October 1990, Jaguar began to suspect fraud at Royal Oaks and it sent a team of officials into the dealership to observe it for an entire week. To avoid detection, "the defendants placed a load of new cars in the service areas for mock repairs, so that the area looked full and technicians were kept busy while Jaguar's representatives were at the dealership." *Id.* Such actions allowed the fraudulent scheme to continue until May 1991.

700. *Id.*

701. A jury awarded Jaguar damages of \$550,000 against Theodore Forhecz, Sr. and \$450,000 against Mark Forhecz. In entering judgment, the District Court adjusted the verdict to reflect treble damages for the RICO violations. *Id.* at 260.

702. *Id.* at 262.

703. *Id.*

704. *Id.*

705. 952 F.2d 702 (3d Cir. 1991). In *Glessner*, the Third Circuit considered whether "the individual defendants who were officers and employees of the corporation can be the 'persons' who were conducting a pattern of racketeering through the corporation as an enterprise." *Id.* at 713. The suit was brought by defrauded customers against the officers of Meenan Oil Company, who allegedly acted through the corporation to fraudulently market and sell residential home heating systems. The *Glessner* panel acknowledged that in certain instances officers and employees could constitute persons conducting a pattern of racketeering activity through a corporate enterprise, but nevertheless dismissed the action. The panel limited § 1962(c) claims against such officers, however, to "only those instances in which an 'innocent' or 'passive' corporation is victimized by the RICO 'persons,' and either drained of its own money or used as a passive tool to extract money from third parties." *Id.* at 713 (quoting *Petro-Tech, Inc. v. Western Co.*, 824 F.2d 1349, 1359 (3d Cir. 1987)).

706. *Jaguar Cars, Inc.*, 46 F.3d at 264.

707. *Id.*

racketeers have successfully positioned themselves as employees and/or officers within an otherwise legitimate corporate enterprise,”<sup>708</sup> which was not the case in *Jaguar Cars*. The court concluded, therefore, that the case was indistinguishable from *Glessner*, but it nevertheless held that defendants were “liable under § 1962(c) as persons managing the affairs of their corporation as an enterprise through a pattern of racketeering activity,”<sup>709</sup> because its previous “application of the distinctiveness requirement to shield corporate officers and directors from § 1962(c) liability [could] . . . not survive *Reves*.”<sup>710</sup> Judge Becker reasoned for the court that the first illustration (where a corporate “enterprise” is a victim of the racketeering activity committed by the defendant “persons”) lies in direct conflict with *Reves*.<sup>711</sup> The Third Circuit quoted *Reves*: “Congress consistently referred to subsection (c) as prohibiting the operation of an enterprise through a pattern of racketeering activity and to subsections (a) and (b) as prohibiting the acquisition of the enterprise.”<sup>712</sup> Accordingly, Judge Becker argued that a “victim” corporation that is drained of its own money by pilfering officers and employees “could not reasonably be viewed as the enterprise through which employee persons carried out their racketeering activity.”<sup>713</sup> Instead, the “proper enterprise would be the association of the employees who are victimizing the corporation, while the victim corporation would not be the enterprise, but instead the § 1962(c) claimant.”<sup>714</sup> The court then stated that the second illustration (the use of a corporate enterprise by infiltrating racketeers as a passive tool or instrument to extract money from third parties) remained a proper, but very limited application of § 1962(c) under *Reves*, where the Supreme Court stated: “‘outsiders’ may be liable under § 1962(c) if they are ‘associated with’ an enterprise and participate in the conduct of its affairs—that is, participate in the operation or management of the enterprise itself. . . .”<sup>715</sup> A § 1962(c) claim can, therefore, exist against persons distinct from the corporate enterprise only so long as they exert sufficient control over the enterprise. The Third Circuit reasoned, however, that the Supreme Court made it clear in *Reves* that the statutory provision’s reach was *not* limited to such rare instances. The *Reves* Court’s analysis reflected the “recognition that ‘inside’ managers [were] . . . the ‘persons’ § 1962(c) was designed to reach.”<sup>716</sup> Thus, “*Glessner*’s limitation to ‘outside’ defendants, who either victimize the corporate

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708. *Id.* at 265.

709. *Id.* at 265.

710. *Id.*

711. *Id.* at 266.

712. *Id.* at 267 (quoting *Reves*, 507 U.S. at 1171). The Third Circuit also observed that the Court reads the “enterprise” in § 1962(c) as a “vehicle through which the unlawful pattern of racketeering activity is committed, rather than the victim of that activity.” *Id.* at 266 (citing *Nat’l Org. of Women v. Scheidler*, 114 S. Ct. 798, 804 (1994)).

713. *Id.* at 267.

714. *Id.*

715. *Id.* (quoting *Reves*, 507 U.S. at 184).

716. *Id.*

enterprise or operate it as a passive tool, cannot survive the Court's holding in *Reves* that 'inside' managers are properly liable under § 1962(c)."<sup>717</sup>

The Third Circuit concluded in *Jaguar Cars* that the distinctiveness requirement in § 1962(c) remained intact: a claim brought only against one corporation as both a "person" and the "enterprise" is not sufficient because "a viable § 1962(c) action requires a claim against defendant 'persons' acting through a distinct 'enterprise.'" <sup>718</sup> Alleging that the officers and employees operate or manage a corporate enterprise, however, the court held, satisfies that requirement; thus, *Jaguar* satisfied the distinctiveness requirement of § 1962(c) because it did "not . . . [bring] a claim against Royal Oaks, but instead seeks recovery from the defendants, as persons operating and managing the enterprise through a pattern of racketeering activity."<sup>719</sup>

To the degree that *Jaguar* buried *Glessner*, the decision is to be applauded, although *Glessner* was wrongly decided independently of *Reves* or *Scheidler*.<sup>720</sup> On the other hand, to the degree that the dicta in *Jaguar* is read to preclude an "enterprise" that is victimized from suing its own officers or employers, *Jaguar* misreads *Reves* and *Scheidler*, and it articulates an innovative rule that is flatly inconsistent with well-established RICO jurisprudence.<sup>721</sup> The Supreme Court in *Reves* and *Scheidler* heard no arguments on the issue; it did not, therefore, decide

717. *Id.*

718. *Id.* at 268.

719. *Id.*

720. See *supra* note 448 (criticism of *Glessner*).

721. See, e.g., *Aetna Cas. Sur. Co. v. P. & B. Autobody*, 43 F.2d 1546, 1558-59 (1st Cir. 1994) (plaintiff may be an "enterprise"); *United Energy Owners Com. Inc. v. U.S. Energy Mgmt Sys., Inc.*, 837 F.2d 356, 362 (9th Cir. 1988) (plaintiff may be an "enterprise"); cf. *Jacobson v. Cooper*, 882 F.2d 717, 719-20 (2nd Cir. 1989) (plaintiff may be part of an "enterprise"); *Springfield Township v. Kuss*, 1993 U.S. Dist. Lexis 14051 at \*9 (E.D. Pa. 1993) (plaintiff may be an "enterprise"); *Com-Tech Assocs v. Computer Assocs. Intern. Inc.*, 753 F. Supp. 1078, 1088 (E.D. N.Y. 1990) (plaintiff may be an "enterprise"), *aff'd on other grounds*, 938 F.2d 1574 (2nd Cir. 1991); *City of New York v. Joseph L. Balkan, Inc.*, 656 F. Supp. 536, 542 (E.D.N.Y. 1987) (plaintiff may be an "enterprise"); *Temple University v. Salla Bros. Inc.*, 656 F. Supp. 97, 102 (E.D. Pa. 1986) (plaintiff may be an "enterprise"). The suggestion that "the proper enterprise" in the victim entity scenario in an association in fact of the employees suffers from multiple defects: it wrongfully assumes that alternative enterprises or that are legally viable may be present in such scenarios; that more than one person will be involved; and that, if so, the group will be more than a mere conspiracy. See *Jaguar Cars*, 46 F.3d at 267. Union embezzlement cases well-illustrate the unwisdom of these assumptions. See, e.g., *United States v. LeRoy*, 687 F.2d 610, 617 (2nd Cir. 1982) (union operated by a pattern of embezzlement); *United States v. Rabin*, 559 F.2d 975, 978 (5th Cir. 1977) (union operated by a pattern of embezzlement), *vacated and remanded*, 439 U.S. 810 (1978), *reinstated in relevant part*, 591 F.2d 278 (5th Cir.), *cert. denied*, 444 U.S. 864). These prosecutions under RICO squarely envisioned by Congress. See, e.g., S. REP. NO. 91-617 at 78 (1969) ("theft from union frauds"). If confining plain text to examples found in the legislative history is improper, as it is, then surely excluding from plain text examples found in the legislative history is equally improper. See *Standefer v. United States*, 447 U.S. 10, 20 n.12 (1980). Needless to say, the cases are legion in which the government successfully casts a victim entity in the role of an enterprise in criminal prosecution under RICO. Numerous other examples are collected in U.S. DEPARTMENT OF JUSTICE, CRIMINAL DIVISIONS, RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS: A MANUAL FOR FEDERAL PROSECUTORS at 6-27 (3rd ed. 1990). This dicta in *Jaguar* is unfortunate. The quicker it is repudiated the quicker RICO may be restored to its proper scope.

the question.<sup>722</sup> The language in *Reves*<sup>723</sup> quoted by *Jaguar*, moreover, was illustrative, not exhaustive, of the “roles” an enterprise can properly play in various configurations of RICO violations, depending on which section of the statute is used, what kind of “enterprise” is charged, and which offenses are the predicate acts.<sup>724</sup> The word “only” does not, in short, appear in the opinions. Unfortunately, the *Jaguar* dicta is misleading other courts.<sup>725</sup> It is a mistake; it should lead to no further damage to RICO jurisprudence.

Significantly, *Jaguar* also raised the issue of whether the owner of Royal Oaks, Theodore, Sr., was liable for aiding and abetting under RICO for the charged predicate acts of mail fraud committed by the employees of Royal Oaks, who systematically mailed false and fraudulent warranty claims to *Jaguar*.<sup>726</sup> While the First Circuit treated the issue summarily, though correctly, the Third Circuit appropriately elaborated on the issue, clarifying that its *Local 560* standard governed. “Plaintiff must prove (1) that the substantive act has been committed, and (2) that the defendant alleged to have aided and abetted the act knew of the

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722. Isolated phrases should not be taken from opinions and applied uncritically to situations that involve different issues. As Chief Justice Marshall ably advised in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821):

It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.

*Accord* *Armour & Co. v. Wantock*, 323 U.S. 126, 132-34 (1994) (stating that

[W]ords of our opinions are to be read in the light of the facts of the case under discussion. To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the Court. General expressions transposed to other facts are often misleading.).

The rule, too, is that which is not argued is not decided. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 n.5 (1992) (“It is, of course, contrary to all traditions of our jurisprudence to consider the law on . . . [a point] conclusively resolved by broad language in cases where the issue was not presented or even envisioned”); *Bernhardt v. Polygraphic Co. of Am. Inc.*, 350 U.S. 198, 202, 208 n.1 (1956) (discussion held not controlling, since “the court did not consider the . . . question present here”; “the court’s attention was not directed toward the question”) (majority opinion; Frankfurter, J. concurring). *See also Jaguar Cars*, 46 F.2d at 266 n.6 (decision not controlling, since issues was “not called to the panel’s attention and the opinion did not either explicitly or implicitly decide [it]”).

723. 46 F.3d at 267 (quoting *Reves*, 114 S. Ct. at 804 (enterprise in § 1962(c) is a “vehicle through which the unlawful pattern of racketeering activity is committed, rather than the victim of that activity”).

724. In fact, *Scheidler*, 114 S. Ct. at 804 n.5 (citing Blakey *supra* note 3, at 307-25) referenced the scholarship of one of our number (Blakey) on the “roles” that enterprises may play. That scholarship observed, “the roles that the enterprise may play a violation of. . . [RICO] may be variously—but not mutually exclusively—described as ‘prize’ ‘instrument,’ ‘victim’ or ‘perpetrator.’” Blakey, *supra*, note 3, at 307. Other courts, too, find that scholarship “helpful.” *American Nat’l Bk & T. Co. of Chi v. Haroco*, 747 F.2d 275, 384, 401 (7th Cir. 1984), *aff’d on other grounds*, 473 U.S. 606 (1985). *See also Reves*, 507 U.S. at 182 (an illustration in legislative history is not necessarily limiting) (citing *Turkette*, 452 U.S. at 591).

725. *See infra* note 839 (critique of *LaSalle Bank Lake View*).

726. *Id.* at 270.

commission of the act and acted with intent to facilitate it.”<sup>727</sup> The court reasoned that the first element was met and that the second element could be inferred from available circumstantial evidence. Theodore was the fifty-one percent owner and active president of the dealership and he was actively involved in its operations; although his son, Mark, directed the fraudulent scheme, Theodore was Mark’s supervisor and met with him on a daily basis to discuss the dealership’s operations. Accordingly, the court found that the “evidence of Theodore’s control over the dealership . . . combined with evidence of the pervasive nature of the fraudulent scheme, allowed the jury to reasonably find Theodore liable of aiding and abetting the predicate acts of mail fraud.”<sup>728</sup> This holding of *Jaguar* on aiding and abetting a RICO violation represents an analytically unassailable result and therefore it should be universally followed.

*United States v. Antar*,<sup>729</sup> the Third Circuit’s next effort to analyze *Reves*, involved securities fraud violations in connection with the Crazy Eddie, Inc. chain of consumer electronics stores. Unfortunately, *Antar* is not soundly reasoned. Eddie Antar was the company’s president and chairman of the board and his younger brother Mitchell was an officer of the company and a member of the board of directors. Both were convicted of RICO, securities fraud, and mail fraud violations; sentenced to prison; and ordered to pay restitution.<sup>730</sup> On appeal, Mitchell argued that since “he resigned from the [Crazy Eddie] enterprise prior to the commencement of the five-year statute of limitations, both conspiracy and substantive liability for post-resignation acts [could not] . . . be attributed to him based on his alleged membership in the conspiracy.”<sup>731</sup> According to *Reves*, as the Third Circuit commented, “the person being sued must exercise some control over the enterprise.”<sup>732</sup> The court then appropriately determined, “[i]t seems fairly clear that Mitchell could not have been charged with violating § 1962(c) based on his acts after he resigned from Crazy Eddie.”<sup>733</sup> While Mitchell continued to own stock in the company after his resignation, no evidence was presented that he played any part in operating or managing the enterprise. The court properly held, however, that this fact did “not necessarily mean that he . . . [could] not [be] chargeable for conspiring to violate § 1962(c).”<sup>734</sup> Citing well-reasoned Seventh Circuit precedent, the Third Circuit stated: “one violates § 1962(d) . . . when [he]

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727. *Id.* (citing *United States v. Local 560 of Int’l Bhd. of Teamsters*, 780 F.2d 267, 284 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986)). See *supra* note 316 *et. seq.*

728. *Id.* at 271.

729. 53 F.3d 568 (3d Cir. 1995).

730. *Id.* at 572.

731. *Id.* at 579. For several years prior to June 5, 1987, Mitchell served as an officer of Crazy Eddie, Inc., as a vice-president in charge of purchasing, a member of the board of directors and one of three members of an office of the president. During this time, he allegedly participated with Eddie and others in the securities fraud scheme that underlay the RICO indictments. On June 5, 1987, Mitchell resigned from the board. *Id.*

732. *Id.* at 580.

733. *Id.*

734. *Id.*

agrees to violate a substantive RICO offense, regardless of whether [he] personally agreed to commit the predicate crimes or actually participated in the commission of those crimes.”<sup>735</sup> Strangely, however, the court then commented, “Mitchell’s argument that courts risk eviscerating *Reves* by blanketly approving conspiracy convictions when substantive convictions under section 1962(c) are unavailable has some merit,”<sup>736</sup> a proposition that should command little concurrence. Without careful analysis of general conspiracy jurisprudence,<sup>737</sup> the court asserted that a distinction could be drawn between conspiring to operate or manage an enterprise, which would yield liability under § 1962(d), and conspiring with someone who is operating or managing the enterprise, in which case liability would not be permissible.<sup>738</sup> According to the court, the defendant in the first instance would be conspiring to do something for which he could be liable under § 1962(c); conspiracy liability should, therefore, attach. In the second instance, no § 1962(c) liability ought to obtain.<sup>739</sup> Nevertheless, the court determined that because the appeal raised the first instance, that is, a “conspiracy to operate or manage an enterprise, and therefore *Reves* and its concomitant policies do not conflict with the conspiracy convictions,”<sup>740</sup> § 1962(d) liability was properly “premised on Mitchell’s membership in the conspiracy, and his performance at that time as an operator or manager of the enterprise.”<sup>741</sup> If resignation from the enterprise did not constitute withdrawal from the conspiracy, then the statute of limitations did not start running. Liability, the Third Circuit stated, could be premised on ordinary principles of conspiracy law, and that result did not conflict with the policies behind *Reves*. The sole question would be whether “having joined the conspiracy, and having committed overt acts in furtherance of the conspiracy, Mitchell can be held liable for the conspiracy based on acts committed by co-conspirators after his resignation.”<sup>742</sup> According to the Third Circuit, the appeal was, therefore, a conspiracy withdrawal case, and “*Reves* has nothing relevant to say on that point.”<sup>743</sup> Because the same backdrop of traditional conspiracy law applies both to the RICO and § 371 conspiracies, Mitchell did not, the court decided, make a *prima facie* case of withdrawal.<sup>744</sup>

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735. *Id.* (citing *Quintanilla*, 2 F.3d at 1484); see *infra* note 795.

736. *Id.* at 581. The Third Circuit was led into error by the observations of two commentators: “if Congress’ restriction of section 1962(c) liability to those who operate or manage the enterprise can be avoided simply by alleging that a defendant aided and abetted or conspired with someone who operated or managed the enterprise, then *Reves* would be rendered almost nugatory.” *Id.* (quoting DAVID B. SMITH & TERENCE G. REED, *CIVIL RICO*, § 5.04 at 5-39 (1994)).

737. See *supra* Part IV, subsection F.

738. *Id.* at 581.

739. *Id.*

740. *Id.*

741. *Id.*

742. *Id.*

743. *Id.*

744. *Id.* at 583-84.

To put it mildly, the reasoning in *Antar* is topsy-turvy. *Reves* is not a conspiracy decision; its holding focuses solely on what is required to violate § 1962(c) as a principle in the first degree.<sup>745</sup> *Reves* says nothing about the scope of § 1962(d). The issue in *Antar*, however, was how to read § 1962(d), not how to read *Reves*, much less how to read it so as to keep it from being “rendered almost nugatory”. Reading § 1962(d) was a question to be answered by reading § 1962(d) against the background of general conspiracy jurisprudence, as modified, if at all, by the text of RICO. The problem was not, in short, to square a particular result in *Antar* with a possible reading of *Reves*, but an actual reading of RICO. Like the Third Circuit, Smith and Reed, too, have it upside down.<sup>746</sup> The court and the commentators on which it relies reason precisely in a fashion that the Supreme Court teaches is wrong under RICO: an analysis that turns silence in RICO’s legislative history into a positive limitation on the scope of RICO’s text does not past muster.<sup>747</sup> Nor can negative inferences be validly drawn from positive statements in legislative history.<sup>748</sup> If it is improper to read the legislative history of RICO in that fashion, it is equally improper to read *Reves* in that fashion. In short, *Reves* is silent about conspiracy liability under RICO; it speaks to liability of a principal in the first degree. Silence, in this context, is “no thing,” that is, zero. Speaking about *another* point is not speaking about *this* point, it is “no thing,” that is, zero. Zero equals zero no matter how many times you multiply it by any figure. RICO’s legislative history cannot validly be used negatively or positively to say what it does not say, nor should *Reves* be used negatively or positively to say what it does not say. Nothing flows from what is *not* said. *Antar*’s dicta that limits the scope of conspiracy under RICO making RICO conspiracy jurisprudence more narrow than general conspiracy jurisprudence,<sup>749</sup> therefore, cannot be squared with basic techniques of statutory interpretation, much less with the purpose of RICO, which sought to broaden, not narrow the law in 1970,<sup>750</sup> its plain text,<sup>751</sup> its liberal

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745. § 1962(d) was noted in *Reves*, but not further discussed. *Reves*, 507 U.S. at 185 n.10.

746. See, *supra*, note 735.

747. *Sedima*, 473 U.S., at 495 n.13. (“Nor does the ‘clanging silence’ of the legislative history. . . justify [a racketeering injury or criminal conviction limitation]. . . [C]ongressional silence, no matter how ‘clanging’ cannot override the words of a statute”).

748. *Turkette*, 576 U.S. at 591 (statement that RICO was designed to apply to the infiltration of legitimate business does not give rise to the “negative inference” that it does not reach the activities of enterprises organized and existing for criminal purposes) (citing *United States v. Naftalin*, 441 U.S. 768, 774-75 (1979) and *United States v. Culbert*, 435 U.S. 371, 377 (1978)).

749. See *supra* note 358 *et. seq.*

750. See P.L. 91-452, 84 Stat. 922-23 (1970) (“because the sanctions and remedies. . .are unnecessarily limited in scope and impact. . .providing enhanced sanctions and new remedies. . .”).

751. Section 1962(d) says “to conspire to violate any of the provisions. . .” 18 U.S.C. § 1962(d) (1994). It does not say “to conspire to violate *as a principal in the first degree* any of the provisions. . .” Its language is the same as 18 U.S.C. § 371 (1994) (“conspire to commit any offense against the United States,” not “conspire to commit any offense *as a principal in the first degree* against the United States. . .”). The Supreme Court properly declined to add “organized crime” to “any person,” *Sedima*, 473 U.S. at 495 (“‘any person’—not just mobsters”), and “pattern,” *H.J. Inc.*, 4902 U.S. at 249 (“decline the invitation to invent a rule”), and

construction clause,<sup>752</sup> or well-established RICO jurisprudence,<sup>753</sup> and the developing post-*Reves* RICO conspiracy jurisprudence in other circuits.<sup>754</sup> It, too, is a mistake; it should lead to no further damage to RICO jurisprudence.

### E. The Fourth Circuit

The only appeal addressing *Reves*'s operate or manage test in the Fourth Circuit<sup>755</sup> is *United States v. Grubb*,<sup>756</sup> a criminal RICO prosecution against James Grubb, an elected circuit judge in West Virginia.<sup>757</sup> In the context of post-*Reves* jurisprudence, Grubb is wholly unremarkable. Grubb strongly supported Oval Adams in his campaign for county sheriff, and he was involved in the payment of bribe money to Adams in exchange for employment with the sheriff's department

"legitimate" to "enterprise," *Turkette*, 452 U.S. at 581 ("by inserting a single word"), in § 1962. It declined to add "in an enterprise" to "any interest," *Russello*, 464 U.S. at 20-23 ("it presumably would have done so expressly"), and "but not legal fees" to "property," *Monsanto*, 491 U.S. 614 ("as presently written, cannot be read any other way"), in § 1963. Finally, it declined to add "only" to "sue," *Tafflin* ("not free to add content") and "racketeeringly" and "competitively" to "injury" and "convicted of" to "violation" in § 1964, *Sedima*, 473 U.S. at 488, 495 ("language . . . gives no obvious indication . . . only after a criminal conviction; "reading of the statute belies any such requirement"). No lower court ought, therefore, to be so bold as to add "as a principal in the first degree" to § 1962(d).

752. See *supra* note [insert]

753. See, e.g., *United States v. Marmolejo*, 86 F.3d 404, 416 (5th Cir. 1996) ("a RICO conspiracy should not require anything more than is required to conspire to violate any other federal crime" (citing *United States v. Neopolitan*, 791 F.2d 409, 497 (7th Cir. 1985), *cert. denied*, 479 U.S. 940 (1986)).

754. See, e.g., *infra* note 795 (discussion of *Quitanilla*).

755. A district court considered the impact of *Reves* on aider and abetter liability in *Clark v. Milam*, 847 F. Supp. 409 (S.D. W. Va. 1994), where plaintiff, the appointed receiver of the George Washington Life Insurance Company, alleged that its auditors were aiders and abettors of a scheme to loot the company's assets. Defendants claimed that *Reves* precluded any RICO claim based on a theory that a defendant aided and abetted a RICO violation by another. *Id.* at 415. The district court noted that although the *Reves* Court concluded that "participation" is not synonymous with aiding and abetting, the Court did not directly address whether aiding and abetting a RICO violation by another can constitute liability under § 1962(c). Since no Fourth Circuit case law was on the point, the court considered the persuasive authority of other Circuits and concluded:

The cases are clear . . . that a defendant need not be the primary agent of control over the enterprise to "participate" in it. Where a defendant's conduct has the effect of controlling some portion of the RICO enterprise, that defendant's participation in the enterprise may rise to the level of conduct within the scope of § 1962(c). Therefore, the use of the term "aiding and abetting" is not helpful because it is the quantity and quality of the defendant's participation in the RICO enterprise that must be evaluated. Such an evaluation can be made only on a case by case basis.

*Id.* at 417. The receiver alleged that the auditors knowingly concealed the activity of other defendants, who exercised day-to-day control over the company, in a manner integral to the operation of the RICO enterprise; the district court found these allegations to be sufficient to sustain a § 1962(c) claim. "Although these Defendants' conduct may not have been as active as the conduct they were concealing, and although they may not have received the same benefits as other defendants, their control need not have been significant to impose liability under § 1962(c)." *Id.*

756. 11 F.3d 426 (4th Cir. 1993).

757. *Id.* at 430. Previously, Grubb was an assistant Logan County prosecutor, an elected member of the county board of education, and a West Virginia State Senator. *Id.*



for one of Grubb's friends.<sup>758</sup> This scheme, along with Grubb's involvement in other illegal acts committed while in office, including aiding and abetting mail fraud,<sup>759</sup> resulted in Grubb's indictment and conviction. Among other counts, Grubb was convicted of violating § 1962(c) for using the office of Judge of the Seventh Judicial Circuit of West Virginia as a RICO enterprise and conducting its affairs through a pattern of racketeering activity.<sup>760</sup>

Grubb appealed his RICO conviction, maintaining that "none of the predicate offenses to the RICO charge involve conduct related to the affairs of the judicial office, the RICO enterprise defined in the indictment."<sup>761</sup> Grubb argued that his political power, which facilitated the predicate offenses, was a result of a long history of political activity, not the result of his political office. The Fourth Circuit phrased the issue on appeal to be "whether the predicate offenses involved conduct of affairs of the office of the judge, within the meaning of 18 U.S.C. § 1962(c)."<sup>762</sup> The Court then unremarkably held that the Office of the Judge of the 7th Judicial Circuit was a properly defined RICO enterprise.<sup>763</sup> The court also found that Grubb was undeniably employed by and involved in the operation or management of his judicial office, the enterprise. Since Grubb occupied the office, no other conclusion was possible. While Grubb attempted to use *Reves* to support his contention that he did not operate his office through racketeering activity, the Fourth Circuit distinguished his prosecution from the facts presented in *Reves* by arguing that *Reves* "emphasized defining 'conduct' and 'participate' to determine who could be brought within RICO's ambit and decided that only those who

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758. *Id.* Grubb personally gave Adams \$3,000 for his campaign and strongly supported him at political rallies. He also met in his judicial chambers with his friend, Tomblin, who offered to give Adams \$10,000 in exchange for two years of part-time work if Adams was elected sheriff. Tomblin needed this work in order to receive his social security and state pension benefits. Grubb then met with Adams to relay this conditional offer. Later, Adams received the money from Tomblin with the understanding that he would hire Tomblin if elected and pay back the money if he was not elected. Adams won the election and hired Tomblin. *Id.*

759. *Id.* Grubb was convicted of aiding and abetting mail fraud. While in office he told, James Burgess, a candidate for state senator in his district, that to win a position on the slate of candidates supported by Grubb he would have to contribute \$10,000 to the campaign. When Burgess filed the campaign finance report required by West Virginia law, this illegal cash payment was omitted. Burgess later testified that he did not worry about this omission or the possibility of legal proceedings or an indictment because he was "dealing with a judge." *Id.* Grubb was also convicted of tampering with a witness by advising Oval Adams, the sheriff, to lie to a grand jury. *Id.*

760. *Id.* at 432. The predicate offenses for RICO were: 18 U.S.C. §§ 2, 1341 (mail fraud); § 1503 (obstruction of justice); and § 1512 (tampering with a witness). 11 F.3d at 438 n.23. The obstruction of justice charge rested on a false statement made to the Federal Bureau of Investigation. *Id.* at 435-38. Grubb argued that just as perjury alone cannot be obstruction of justice, so, too, a false statement alone cannot be obstruction of justice. *Id.* (citing *In Re Michael*, 326 U.S. 224 (1945)). The Fourth Circuit agreed, but found that more than a mere false statement was established, 11 F.3d at 437-38.

761. *Id.* at 438.

762. *Id.*

763. *Id.* (citing *United States v. Hunt*, 749 F.2d 1078, 1088 (4th Cir. 1984) (judgeship can be an enterprise for RICO purposes), *cert. denied*, 472 U.S. 1018, (1985)).

manage or operate an enterprise are covered under RICO.”<sup>764</sup> Distinguishing *Reves*, the Fourth Circuit held that in Grubb’s appeal it needed only to “examine the connection required between the racketeering activity and an enterprise’s affairs, i.e., whether Grubb’s racketeering activity involved the affairs of his office.”<sup>765</sup> The court found that since Grubb physically used the telephones and the area of his actual office itself, not to mention the prestige and the power of his legal position, that “a sufficient nexus between the enterprise and the racketeering activity is established.”<sup>766</sup>

### F. The Fifth Circuit

To date, the Fifth Circuit has not addressed the “operation or management” analyses. A brief consideration of *Reves* occurs at the district court level in *Crowe*

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764. *Id.* at 439 n.24.

765. *Id.*

766. *Id.* at 439 n.24 (“there is no doubt that Grubb participated in the operation or management of the enterprise, i.e., the judicial office”).

The Fourth Circuit stringently uses procedural rules to screen civil RICO cases. In *Bast v. Cohen, Dunn & Sinclair, P.C.*, 59 F.3d 492 (4th Cir. 1995), the court upheld a Fed. R. Civ. Pro. 12(b)(6) dismissal of Bast’s claims on the grounds that he made no allegation of racketeering activity nor did he identify a RICO enterprise in his pleadings. Additionally, it held Bast did not have standing to assert a civil damages claim because he did not allege “any injur[y] in his business or property” by reason of a RICO violation; the court cited *Reves* to support its holding that an allegation of “participat[ion] in the conduct of such enterprise’s affairs” was essential.

*Id.* at 495. Finally, the Court noted “[g]iven the complete deficiency of a properly pleaded civil RICO claim, dismissal of Bast’s claims was not only correct, but required.” *Id.* at 496. See *Lust v. Burke*, 876 F.Supp 1474, 1479 (D.Md. 1994) (*Reves* requires that plaintiffs allege that defendants had a role in directing the affairs of a RICO enterprise.). *Burke* provides a helpful discussion of the level of particularity needed in pleading the elements of RICO and the statute of limitations. After the original pleadings alleging RICO were dismissed by the district court, the plaintiffs were granted leave to amend. The court found that the amended allegation that defendant Burke “provided accounting and other financial services. . . participated in at least three of the fraudulent schemes. . . by serving as of the partners of several partnerships which formed part of a RICO enterprise” was sufficient to meet the *Reves*’ requirements. *Id.* at 1481. Further, the “court found that had Burke only provided accounting services, like the defendant in *Reves*, he would have avoided RICO liability; his role as a partner in several fraudulent investment schemes was, however, sufficient to show “Burke directly participated in the management and operation of those schemes in violation of RICO.” *Id.* at 1482. In a discussion involving a different group of defendants, the court added, “plaintiffs must do more than merely rely on the familial relationship between these various defendants to be entitled to relief.” *Id.* at 1482.

*Clark v. Milam*, 847 F.Supp. 409, 415-17 (S.D.W.Va. 1994), also merits brief analysis. *Clark* addressed aiding and abetting liability in light of *Reves*. The district court properly concluded that *Reves* did not address aiding and abetting liability under RICO. Accordingly, it did not preclude it. Rather, it merely emphasized that “participate” does not mean primary responsibility for the operation but just “some part in directing the enterprise”.

Two other Fourth Circuit cases dealt with *Reves* in a context outside of the operation or management test: *United States v. Mitchell*, 39 F.3d 465 (4th Cir. 1994), *cert. denied*, 115 S.Ct. 2578 (1995) and *Parker v. Department of Labor*, 75 F.3d 929 (4th Cir. 1996). Both cite *Reves* to support the proposition that “[t]he plain language of the statute will control unless the legislative history demonstrates that Congress clearly intended a contrary meaning.” 39 F.3d at 468; 75 F.3d at 933. A member of the panel (Judge Williams) in *Parker* also found that relying on policy, as another member of the panel (Judge Mornaghan) did, to expand the scope of statute beyond its plain language was “particularly inappropriate,” since the Supreme Court had apparently admonished the lower courts for substituting their own policy preferences for those of Congress. 75 F.3d at 933.

*v. Smith*,<sup>767</sup> where the plaintiff claimed to be the victim of a fraudulent scheme to divest him of his interest in land holdings.<sup>768</sup> The plaintiff alleged that the defendant attorney, in his capacity as counsel to a savings bank and its subsidiaries, was a “principal planner and actor in the purported scheme, and [that] his letter-writing and filing of lawsuits against [the plaintiff] were all part and parcel of this scheme.”<sup>769</sup> The law partners of the attorney, who were also named as defendants, moved for dismissal of the § 1962(c) claim, arguing that the attorney’s actions failed to rise to the level of operation or management under *Reves*. The law partners also urged the district court to “find (or forge) a broad shield from RICO for attorney advocacy.”<sup>770</sup> The court appropriately held: “We find no such shield in the language of RICO or the case law, and we decline to form one of our own making.”<sup>771</sup> Further, the Court determined that under the allegations of the complaint, the attorney participated in the operation or management of the savings bank and its subsidiaries, the named RICO enterprises. Thus, the motion to dismiss was denied.

### G. The Sixth Circuit

Two Sixth Circuit decisions touch on *Reves*. One is unremarkable. The other falls into the trap of seeing *Reves* as a per se exclusion; it, too, moves in the direction of creating a safe harbor for outsiders. It also fails to consider alternative theories of liability. The Sixth Circuit needs to rework its post-*Reves* RICO jurisprudence.

The Sixth Circuit first considered *Reves* in *Davis v. Mutual Life Ins. Co. of N.Y.*,<sup>772</sup> where defendants, Donald Fletcher and his agency, Fletcher Insurance Associates (“FIA”), used fraudulent sales tactics to sell life insurance policies to

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767. 848 F. Supp. 1258 (W.D. La. 1994). See also *Crowe v. Henry*, 43 F.3d 198 (5th Cir. 1995) (RICO persons not plead and not plead; association in fact of two persons plead; §§ 1962(a) and (b) plead; distinction between person and enterprise not plead; § 1962(d) not plead specifically), a related *Crowe* piece of RICO litigation. In *Crowe*, the Fifth Circuit did not discuss *Reves*, but it did continue to hold that aiding and abetting liability under RICO is authorized. 43 F.3d at 206 (citing *Armco Industrial Credit Corp. v. SLT Warehouse Co.*, 782 F.2d 475, 485-86 (5th Cir. 1986)); see also *In Re Taxable Municipal Bond Securities Litigation*, 51 F.3d 518, 520-24 (5th Cir. 1995) (The complaint in district court was withdrawn by some, but not all, plaintiffs on *Reves* grounds. On appeal of summary judgment, was affirmed. Plaintiff who did not purchase bonds was denied standing and no injury was shown beyond speculation).

768. *Crowe* entered into a partnership with a wholly-owned subsidiary of a savings bank. The president of the bank was given control over the operation of *Crowe*’s land development. *Crowe* contended that the officers of the bank, the bank’s attorney and the attorney’s law firm devised a plan to fraudulently acquire his interest in the land. Defendants’ purported scheme included “whipsawing *Crowe* in a flurry of legal proceedings (including the fraudulent institution of bankruptcy proceedings, liquidation actions, and foreclosure proceedings), starving *Crowe* for cash, and overpowering *Crowe* through their greater resources, such as their retainer of [their attorneys].” *Id.* at 1260.

769. *Id.* at 1264.

770. *Id.*

771. *Id.*

772. 6 F.3d 367 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1298 (1994).

the plaintiffs for two life insurance companies: Mutual Life Insurance Company of New York (“MONY”) and Trans World Assurance Company (“TWA”), which were also named as defendants.<sup>773</sup> The jury found that Fletcher and MONY violated RICO § 1962 (c), and awarded damages. On appeal, MONY asked the court to reverse the finding of liability under § 1962(c). The jury found that MONY and Fletcher conducted or participated in the affairs of FIA (or some other “association-in-fact” enterprise) through a pattern of racketeering activity.<sup>774</sup> On appeal, MONY argued that under the § 1962(c) “distinctness” requirement, a corporation “ought not be liable under § 1962(c) for participating in the affairs of an enterprise that consists only of its own subdivisions, agents, or members.”<sup>775</sup> MONY argued that the jury verdict violated this requirement because MONY was held liable for participating in the affairs of FIA, which, according to MONY, was nothing but an association of MONY agents. The Sixth Circuit disagreed, stating that the issue was whether sufficient evidence was introduced to support the jury’s finding that the enterprise was, in fact, distinct from MONY. The court concluded that adequate evidence was introduced, and that FIA was appropriately found to be an independent organization.<sup>776</sup> The Sixth Circuit found that this conclusion was unaffected whether or not MONY acted through Fletcher. The court acknowledged that since MONY’s liability was predicated on acts committed by Fletcher, and, since Fletcher could not be associated with FIA, then MONY’s liability must similarly be barred. Nevertheless, the court asserted that this reasoning was “flawed.” First, “[i]t matters not that MONY acted through an individual whose distinctness from the enterprise is open to question; what matters is that MONY itself and the enterprise are distinct.”<sup>777</sup> Second, although “RICO forbids the imposition of liability where the enterprise is nothing more than a subdivision or a part of the person, the requirement does not run the other way.”<sup>778</sup> Indeed, RICO

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773. *Id.* at 371. In 1980, Fletcher and FIA began selling life insurance policies for MONY. Three years later, Fletcher disassociated himself from MONY and began selling insurance for TWA. Fletcher sold the policies by emphasizing tax advantages, telling potential investors they could drastically reduce (or even eliminate) their federal income tax liability by purchasing the insurance in conjunction with the formation of a home-based business. Fletcher prepared his clients’ federal withholding (W-4) forms by claiming enough exemptions to reduce the taxes withheld from their paychecks to zero. He arranged for premium payments to be made in an amount equal to one-half of what was previously withheld. He prepared his clients’ federal tax returns, claiming liberal deductions so that no tax was owed. He also promised legal protection in case of an audit. When the scheme unraveled and the IRS audited each plaintiff’s tax return, plaintiffs were charged hundreds of thousands of dollars for invalid deductions and penalties. *Id.* at 371-372.

774. *Id.* at 376.

775. *Id.* at 377.

776. *Id.* The Court noted that FIA was already firmly established in 1980 when Fletcher approached MONY with his offer to sell insurance. In addition, FIA conducted its own seminars for recruiting clients and training agents, possessed its own board of directors, as well as its own business cards and stationary. Finally, FIA remained intact after Fletcher disassociated from MONY in 1983. *Id.*

777. *Id.* at 378.

778. *Id.*

requires that the person be employed by or associated with the enterprise.<sup>779</sup> MONY argued that, as a matter of law, a corporate principal may not be vicariously liable for its agents' actions in violation of § 1962(c). Taking into consideration conclusions reached by other circuits, the Sixth Circuit acknowledged that under § 1962(c) "plaintiffs may not use RICO to impose liability vicariously on corporate 'enterprises,' because to do so would violate the distinctness requirement."<sup>780</sup> Nevertheless, "no such prohibition prevents the imposition of liability vicariously on corporate 'persons' on account of the acts of their agents, particularly where the corporation [is not the enterprise and it is] benefitted by those acts."<sup>781</sup> Such a prohibition would prevent corporate persons from *ever* being found liable under RICO because corporate principals may only act through their agents. Plaintiffs sought to impose liability on MONY as a "person" and presented evidence that MONY actively supported and sponsored the fraudulent scheme. The Court found no reason, therefore, to disregard ordinary principles of respondeat superior, and it affirmed the jury's finding that MONY was liable under § 1962(c) for its participation in Fletcher's fraudulent scheme.<sup>782</sup>

The Sixth Circuit also noted that *Reves* dealt with a topic closely related to that of vicarious liability. According to *Davis*, the *Reves* court concluded that § 1962(c) of RICO extended only to persons who possessed some part in directing the affairs of the enterprise; that analysis, the Sixth Circuit determined, did not affect its decision in *Davis* because MONY, in fact, exercised sufficient control over the

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779. An example in the Sixth Circuit at the district court level of an individual being "associated with" an enterprise who met the "operation or management" test is presented in *Shuttlesworth v. Housing Opportunities Made Equal*, 873 F. Supp. 1069, 1076 (S.D. Ohio 1994). Plaintiff, a landlord, sued a variety of defendants including a corporation formed to provide housing opportunities ("HOME"), the Housing Assistance Legal Fund ("HALF"), private attorneys, and an officer of the Department of Housing and Urban Development ("HUD"), alleging that they solicited female tenants to bring false sexual harassment claims and lawsuits against him. The *Reves* issue concerned whether two attorney defendants, who characterized themselves as mere outside counsel, reached the necessary level of participation in the alleged RICO enterprise to be liable under § 1962(c). The RICO enterprise was only vaguely described by plaintiff, but the district court understood it to consist of a "nameless alliance" of HOME, HALF, the attorneys and those who had lodged complaints against plaintiff. *Id.* at 1075. The court determined that the attorneys actively solicited sexual harassment complaints from the plaintiff's tenants in return for material incentives, thereby engaging in acts of attempted bribery. Noting that bribery was the specific example given by the *Reves* Court of how an individual "associated with" the enterprise could exert control over it, the district court held that "were the courts to treat such conduct as being outside of the scope of an enterprise's operation or management, low-level operatives responsible for carrying out much of a racketeering entity's 'dirty work' could never be held responsible for their actions under the RICO statute." *Id.* at 1076.

780. *Davis*, 6 F.3d at 379.

781. *Id.* Here, the court specifically distinguished *Schofield v. First Commodity Corp.*, 793 F.2d 28, 32-33 (1st Cir. 1986); *Luthi v. Tonkacorp*, 815 F.2d 1229, 1230 (8th Cir. 1989); and *D & S Auto Parts Inc. v. Schwartz*, 838 F.2d 964, 968 (7th Cir.), *cert. denied*, 486 U.S. 1061 (1988). Each rejected *respondeat superior* liability, but in each decision the defendant was not distinct from the enterprise. 6 F.3d at 379. Where the defendant is distinct, no rule under RICO, the court held, blocks vicarious liability. *Id.* (citing *Brady v. Dairy Fresh Products Co.*, 9074 F.2d 1149, 1154 (9th Cir. 1992)).

782. *Id.* at 380. The court, however, declined to uphold a multiplier for the attorney's fees awarded under 18 U.S.C. § 1964(c) (1994) based on contingency. *Id.* at 381 (citing *City of Burlington v. Dague*, 505 U.S. 557, 560-67 (1992)).

affairs of the RICO enterprise to meet the *Reves* test. The Sixth Circuit appropriately reasoned that Fletcher himself exercised sufficient control over the affairs of the enterprise to meet the requirements of the *Reves* test. Fletcher's acts and his role within the RICO enterprise could be attributed to MONY and his acts consequently met the requirements of the *Reves* test. Further, the court held, "MONY's participation in the affairs of FIA or some other association-in-fact was sufficiently extensive to meet the requirements of *Reves* even if we were to refuse to attribute to MONY Fletcher's control of the enterprise."<sup>783</sup> MONY, after all, continued to encourage the scheme, even though it received numerous warnings concerning FIA's fraudulent sales tactics. Given this evidence and the central role that MONY's life insurance played in the scheme, the court unremarkably found that MONY possessed "sufficient control over the affairs of the RICO enterprise to withstand scrutiny under *Reves*."<sup>784</sup>

If *Davis* was correctly decided, as it was, and if *Conley* still states a vital principle, then *Stone v. Kirk*<sup>785</sup> was wrongly decided. David Stone worked for Amber Coal Company. Part of Stone's compensation included having Amber's accountant, John Kirk, prepare the Stones' income tax returns. When Stone began earning hundreds of thousands of dollars a year, Kirk recommended that he buy tax shelters from him in order to reduce his heavy tax burden. Each tax shelter was organized as a joint venture among several investors with Kirk acting as the agent.<sup>786</sup> The business of the joint ventures entailed the leasing of a "master recording" that featured the work of well-known country music singers leased from Sagittarius Recording Company. Unknown to the investors, Sagittarius acquired these recordings at grossly inflated prices, supported by fraudulent appraisals. Investment tax credits based on the bogus purchase prices were supposed to be passed through to the lessee-investors. Kirk was not involved in the purchases or appraisals of the recordings. Stone, on the advice of Kirk, who acted as a sales representative for Sagittarius, invested \$90,000 in these ventures. The tax credits were ultimately disallowed by the IRS and Stone ended up owing the IRS \$280,000 in back taxes, interest, and penalties.<sup>787</sup> In the ensuing RICO lawsuit, Kirk was held liable for treble damages, having acted with "fraud and deceit" with the sale of master recording leases.<sup>788</sup> On his appeal—without considering any alternative analysis—the Sixth Circuit held that *Reves* was wholly dispositive of Stone's RICO claim, that is, it was a per se exclusion of liability, because "Sagittarius Recording Company, or Sagittarius and those associated with it,

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783. *Id.*

784. *Id.*

785. 8 F.3d 1079 (6th Cir. 1993).

786. *Id.* at 1081.

787. *Id.* at 1083.

788. *Id.* at 1084. Kirk, who filed for bankruptcy, was also found responsible for securities fraud. *Id.* at 1087. That debt, too, was held not dischargeable under 11 U.S.C. § 523(a)(2)(A)(1994) ("acted with fraud and deceit"). Dischargeability was also held to be an equitable decision to be made by the court, not the jury. *Id.* at 1090-91.

[was]. . . [the] 'enterprise' . . . ."<sup>789</sup> Kirk, the court argued, was only associated with Sagittarius as a sales representative, just as Arthur Young was only associated with the *Reves* co-op as an auditor.<sup>790</sup> While Kirk (like Arthur Young) engaged in a pattern of racketeering activity when he repeatedly violated the antifraud provisions of the federal securities laws, Kirk (like Arthur Young) did not participate in the "operation or management" of the RICO entity with which he was associated and, because he possessed no part in directing the affairs of Sagittarius, the court determined that Kirk could not be held liable under § 1962(c).<sup>791</sup> As in the Second Circuit's decision in *Azrielli*,<sup>792</sup> and the Third Circuit's decision in *University of Maryland*,<sup>793</sup> that conclusion need not follow. Surely, here, too, Stone should have been given an opportunity on remand to replead his otherwise meritorious fraud claim using an alternative RICO theory, particularly since *Reves* was decided after the oral argument in the appeal.<sup>794</sup> The score in the Sixth Circuit is one to one.<sup>795</sup>

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789. *Id.* at 1092.

790. *Id.*

791. *Id.*

792. *See supra* note 595.

793. *See Supra* note 683.

794. 8 F.3d at 1091 n.6. In *Stone*, Kirk operated his accounting business as a sole proprietorship, which would meet all of RICO's elements and passed the *Reves* test. Sole proprietorships are properly found to be RICO enterprises. *See, e.g., Benny*, 786 F.2d at 1416; *McCullough*, 757 F.2d at 144; *State v. Bowen*, 413 So. 2d 798 (Fla. Dist. Ct. App. 1982). Certainly, Kirk managed and operated the affairs of his sole proprietorship.

Alternatively, the enterprise might be identified as the joint ventures that were created to control the tax shelter investments. The Sixth Circuit explained, "each tax shelter was organized as a joint venture among several investors. The investors pooled their funds and jointly empowered Mr. Kirk to conduct the affairs of the venture as their agent." 8 F.3d at 1081. These joint ventures were association-in-fact RICO enterprises, and Stone operated them through a pattern of racketeering activity; certainly, Kirk was involved in their management and operation.

Some courts, however, hold that inanimate objects—or the business activity surrounding them—are not a RICO "enterprise" for purposes of § 1962. *See, e.g., Elliot*, 867 F.2d at 881; *Old Time Enters.*, 862 F.2d at 1218; *Creed Taylor, Inc. v. CBS, Inc.*, 718 F. Supp. 1171, 1178 (S.D.N.Y. 1989); *In re Catanella & E.F. Hutton & Co., Inc. Sec. Litig.*, 583 F. Supp. 1388, 1426 (E.D. Pa. 1984). These holdings, of course, undercut the argument that the joint ventures created to manage the tax shelter investments could be the RICO enterprise. Nevertheless, these holdings are mistaken and analytically indefensible. The word "enterprise" is not defined in the statute. 18 U.S.C. § 1961(4) (1994). Instead, an illustrative list of what *may* constitute enterprise is given. To determine if other kinds of "enterprises" are with the concept the plain meaning of the statutory term must be examined. WEBSTER'S THIRD NEW INT'L DICTIONARY (1961) provides two definitions of "enterprise." The first describes an "enterprise" as a "venture, 'undertaking,' or 'project'". WEBSTER'S THIRD NEW INT'L DICTIONARY at 757 (1961). The second defines enterprise as "a unit of economic organization or activity (as a factory, a farm, a mine)." *Id.* Thus, the joint venture surrounding and dealing with the tax shelters should be found to be an enterprise. *See also* OXFORD ENGLISH DICTIONARY 293 (2d ed. 1989). This line of analysis is supported by *Godoy*, 678 F.2d at 86, finding "ownership of the two pieces of . . . real estate constitutes an 'interest in any enterprise,' " and *Bhatla v. Resort Dev. Corp.*, 720 F. Supp. 501, 510 (W.D. Pa. 1989), holding that a condominium can be a RICO enterprise. Thus, the joint ventures in *Stone* could also be a RICO enterprise.

795. The most recent use of *Reves* in the Sixth Circuit came in *Nixon v. Kent County*, 76 F.3d 1381 (6th Cir. 1996), a Voting Rights Act claim brought by a group of African Americans and Hispanics challenging a county apportionment plan, in which it is cited to support a plain language reading of a statute: "[i]f the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." *Id.* at 1386 (quoting *Reves*). A number of district court decisions also interpret it. In *Whaley v. Auto Club Insurance Association*, 891 F. Supp. 1237 (E.D. Mich. 1995), Whaley, an

### H. The Seventh Circuit

As of this writing, the Seventh Circuit has faced four major post-*Reves* decisions and it reached appropriate results in three. While well-reasoned, the civil decisions focused more on finding pleading mistakes than on doing substantial justice. Seventh Circuit post-*Reves* jurisprudence well-illustrates each of the tendencies—for good and for ill—in the other circuits.

The first case, a criminal appeal, was *United States v. Quintanilla*,<sup>796</sup> in which the court reached an appropriate result on the scope of § 1962(d), holding, in short, that *Reves* had no impact on it. *Quintanilla* involved a scheme to defraud the G. Heileman Brewing Company through the submission of false proposals to the company's sponsorship program.<sup>797</sup> Heileman funded activities, including sporting events and neighborhood festivals, at which it promoted its various brands of beers. Joseph Monreal, its Director of Hispanic Market Development, screened proposals for sponsorship funds and made recommendations. Along with Leticia Gutierrez, he devised a scheme to defraud Heileman. Monreal approached several Chicago Hispanic organizations and persuaded them to allow Gutierrez to draft proposals on behalf of their groups. Once submitted, Monreal recommended that they be funded; in return, he received a kickback of the funding. Carlos Quintanilla, the founder and executive director of Operation Search, a community organization providing employment services to low income residents, joined the scheme and agreed to give Monreal a cut of the award. Eventually, Quintanilla

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insurance sales representative, claimed her employer had violated RICO by retaining commissions that she earned by selling Michigan automobile insurance placement facility (MAIPF) policies. The MAIPF is a state established assigned risk pool that provides auto insurance to drivers who do not qualify for conventional policies. Whaley alleged that Auto Club, by denying her and other agents commissions, gained control of the MAIPF, an enterprise, through a pattern of racketeering activity. *Reves* is cited in *Whaley* to show the essential elements of a RICO claim. First, a proper RICO pleading under § 1962(b) requires the plaintiff to allege that the defendant "acquire[d] control or interest in an interstate enterprise through the use of racketeering activity." *Id.* at 1240. The court held that "interest" means a proprietary interest and the "control" over an enterprise's operations comes from acquisition of that interest. *Id.* at 1240. The court found, however, that Whaley did not allege that the misappropriation of commissions lead Auto Club to gain an "interest" in MAIPF as an enterprise. Second, the court found that while Auto Club had representatives on MAIPF's board of governors, that alone was not enough to satisfy the *Reves* "operation or management" test. Finally, Whaley alleged that Auto Club committed mail fraud by signing her name as the producer of the policy rather than the name of the agent that sold the policy; the commissions were then misappropriated because MAIPF wrote the commission checks to Auto Club. As a result, MAIPF's affairs were, according to the complaint, being conducted through a "pattern of racketeering activity." *Id.* at 1243. The court dismissed this claim, too, on the ground that "there [was] absolutely no nexus between the alleged racketeering activity and Auto Club's participation in the management of the MAIPF." *See also American Manufacturers Mutual Insurance Co. v. Townson*, 912 F. Supp. 291 (E.D. Tenn. 1995). In *Townson*, American Manufacturers brought a RICO suit against the Townsons for property insurance fraud. The court found that a marriage could be an "enterprise" because it involves "a group of persons associated together for a common purpose of engaging in a course of conduct." *Id.* at 295. The court also found that participation in a marriage meets the *Reves* "operation or management test".

796. 2 F.3d 1469 (7th Cir. 1993).

797. *Id.* at 1471.



received \$175,000, Monreal pocketed \$295,054, and Gutierrez gained \$38,000.<sup>798</sup> When the scheme was uncovered,<sup>799</sup> the defendants were convicted, among other things, of conspiring to violate RICO under § 1962(d).<sup>800</sup> On appeal, Gutierrez argued that her RICO conspiracy conviction should be reversed in light of *Reves*, which was decided after oral argument.<sup>801</sup> Given the Supreme Court's adoption of the "operation or management" test, Gutierrez argued that because she was not employed by Operation Search and, thus, possessed no connection with the management of the enterprise, *Reves* required that her conviction for RICO conspiracy be reversed.<sup>802</sup> Appropriately, the Seventh Circuit commented, "the defendant confuses her conviction for conspiracy (an agreement to commit a crime) with a conviction for a substantive crime."<sup>803</sup> The court then appropriately held that § 1962(d)—unlike § 1962(c)—"is not a substantive RICO offense; rather, it merely makes it illegal to conspire to violate any of the preceding sections of the statute."<sup>804</sup> Citing Eleventh Circuit precedent, the court held that "the content of the agreement criminalized by RICO is. . . defined against the backdrop of general conspiracy law."<sup>805</sup> "[U]nder this approach, it is only necessary that the defendant agree to the commission of the two predicate acts on behalf of the conspiracy."<sup>806</sup> To require the government to prove that all of the alleged co-conspirators conducted, or participated in the conduct of, the affairs of the

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798. *Id.*

799. Gutierrez was romantically involved with Monreal but, when the relationship turned sour in June 1986, she informed Heileman's General Counsel about Monreal's scheme. The matter was referred to the U.S. Attorney and Gutierrez cooperated with the investigation, making monitored phone calls to Monreal and wearing concealed electronic recording devices in his presence; she also produced copies of relevant documents. *Id.* at 1470.

800. The predicate offenses included 18 U.S.C. §§ 2, 1341 (mail fraud), § 1344 (wire fraud), and 2314 (transportation of stolen property). Quintanilla argued that his convictions under §§ 2314 and 1962(d) should be reversed, since after the district court directed a judgment of acquittal under § 1341, the government substantially redacted the indictment, including removing reference to "scheme to defraud." Since § 2314 does not require a "scheme to defraud" its redaction, the court held, did not prejudice Quintanilla. 2 F.3d at 474-76. Quintanilla also argued in the court of appeals, but not the district court, that the redacted indictment did not adequately allege a "knowing" transportation. Because the issue was not raised in the district court, the court of appeals treated it as waived and considered it only under the plain error rule. FED. R. CRIM. P. 52(b); 2 F.2d at 1476 (citing *United States v. Caputo*, 978 F.2d 972, 974 (7th Cir. 1992) (to avert a miscarriage of justice)). The court then found no plain error. *Id.* at 1478. Next, the court rejected Quintanilla's argument that § 2314 requires an identity of the funds stolen with those transported; the Court held that derivation sufficed. *Id.* Finally, it rejected Quintanilla's multiple conspiracy objection. *Id.* at 1480-81 n.10 (citing *Neopolitan*, 791 F.2d at 501 (the government "is the master of the scope of the charged RICO conspiracy" and commenting "the ability to define the conspiracy carries with it the responsibility of proving what is specifically alleged"))).

801. *Id.* at 1482.

802. *Id.* at 1484. The government argued the Gutierrez waived her *Reves* argument because she did not press it in the district court: the Second Circuit rightly rejected the government audacious contention, holding that she "raised her argument under *Reves* at the first opportunity." *Id.* at n.20.

803. *Id.*

804. *Id.*

805. *Id.* (citing *Carter*, 721 F.2d at 1529).

806. *Id.* (citing *Neopolitan*, 791 F.2d at 498).

racketeering enterprise to the extent mandated by § 1962(c), would “entail a degree of involvement in the affairs of the conspiracy that is not required in any other type of conspiracy, where agreeing to a prescribed objective is sufficient.”<sup>807</sup> Accordingly, § 1962(d) liability need not be coterminous with liability under § 1962(c), if RICO is to be read as broadly as other conspiracy statutes. Upholding the conviction of Gutierrez, the court properly concluded, therefore, that “*Reves* addressed only the extent of conduct or participation necessary to violate a substantive provision of the statute; the holding in that case did not address the principles of conspiracy law undergirding § 1962(d).”<sup>808</sup> *Quintanilla* is a craftsman-like opinion that well-deserves the adherence it is receiving as it is argued in other circuits.<sup>809</sup>

The *Reves* issue was also raised in *Richmond v. Nationwide Cassel*,<sup>810</sup> where Adrienne Richmond purchased a car under an installment plan that provided car insurance for her when she failed to purchase her own insurance. *Richmond* is a difficult decision to categorize. Analytically, it is sound, but it does not come out right. Had a different and more skillfully pleader handled her case, Ms. Richmond may well have won her appeal. Legal results, however, ought to turn on more than the skill of lawyers. Justice, too, ought to play a substantial role; it did not in *Richmond*. Ms. Richmond brought her suit under RICO against defendants

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807. *Id.* at 1485.

808. *Id.* at 1484-85 (citing *Jones v. Meridian Towers Apartments*, 816 F. Supp. 762, 773 (D.D.C. 1993) (“would add on element to RICO conspiracy the Congress did not direct.”) (quoting *United States v. Pryba*, 900 F.2d 748, 760 (4th Cir.), *cert. denied*, 498 U.S. 924 (1990)). The court of appeals did not, however, reach the issue of whether at least one of the alleged conspirators must possess the capacity of violating § 1962(c). *Id.* at 1485 n.21.

809. See *infra* note 907 (discussion of *Starett*).

The Seventh Circuit also cited *Reves* in *United States v. Rainone*, 32 F.3d 1203, 1207 (7th Cir. 1994), in which the court upheld an “organized crime” departure in the sentencing of a member of the Chicago “outfit,” which, in turn, was once led by Al Capone himself. The Court observed:

The motivation for and the scope of a statute are often and here different things. The term “racketeering activity” in the RICO statute is a defined term, and the definition is remote from the ordinary-language meaning; all it means is committing one of a number of specified criminal acts . . . . For conviction, it is true, some minimum structure is required. . . . [that is] an “enterprise” is required. . . . But the “enterprise” need be nothing more than a small informal gang. . . . having minimum structure and continuity; or a lawful enterprise turned to a corrupt end by a corrupt manager. . . . We deal here with a criminal syndicate of extensive scope and extraordinary durability—one of the oldest and most notorious criminal enterprises in the United States. Had the guideline range for RICO offenses been set with the Chicago Outfit in mind, it would have greatly overpunished the run of the mill criminal activities that are the routine grist of RICO prosecutions.

We grant that the term “organized crime” is nebulous, and that there are dangers in too casually attaching the appellation to gangs that happen to seem particularly ominous. But we need not explore the outer bounds of the permissible “organized crime” departure in this case. The Chicago Outfit is the clearest possible example of a gang operating on such a scale, with such success, over such a long period of time that the danger which it poses to society is not adequately reflected in the guideline range. It is not your average criminal RICO violator.

(citations omitted).

810. 52 F.3d 640 (7th Cir. 1995).

Nationwide Cassel, L.P. ("Cassel"), Nationwide Acceptance Corporation ("Nationwide Acceptance"), and N.A.C. Management Corporation ("NAC"),<sup>811</sup> alleging that they forced her to pay for excessive automobile insurance in violation of § 1962(c).<sup>812</sup> The district court dismissed her complaint on the grounds that it did not satisfy the Seventh Circuit's variation of the enterprise-person rule.<sup>813</sup> On appeal, she argued that Cassel, Nationwide Acceptance, and NAC constituted an enterprise, the "Nationwide Group," a group of corporations and entities "associated in fact on an ongoing basis for the purpose of selling and financing automobiles."<sup>814</sup> She also contended that "the Nationwide Group and the car dealers with which it maintains relationships and from which it purchases retail installment contracts"<sup>815</sup> was an enterprise.

Affirming the district court's dismissal of her complaint,<sup>816</sup> the Seventh Circuit agreed with the district court, holding that "the plaintiff's naming of a string of entities. . .[did] does not allege adequately an enterprise."<sup>817</sup> Even if her RICO claim adequately identified an enterprise, it also had to allege that the "person" associated with the enterprise participated in the operation or management of the enterprise itself, in accordance with *Reves*.<sup>818</sup> That "person," too, had to be separate and distinct from the enterprise.<sup>819</sup> To meet the court's objections, Richmond ineffectually argued that the three defendants were the "persons," that their conduct involved the forced placement of excessive automobile insurance, and that the enterprises were the group of entities associated-in-fact to sell used cars and the accompanying car warranties and insurance. According to Richmond, "as long as the 'enterprise' constitutes a structured group of persons or firms that engages in organized economic activities, the conduct of one aspect of that economic activity by one member of the group through fraud is cognizable under

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811. Richmond's installment contract was assigned to Cassel by the dealership where she bought her car. Cassel, a limited partnership, is a sales finance agency that purchases car retail installment contracts and enforces the contracts against consumers. NAC is the general partner and 1% owner of Cassel. Nationwide Acceptance, the other partner and 99% owner of Cassel, is also a sales finance agency. Cassel and Nationwide Acceptance, which present themselves to the public as indistinguishable entities, have ongoing relationships with certain car dealers from which they purchase motor vehicle retail installment contracts. Richmond's complaint also alleged that Cassel, Nationwide Acceptance and NAC were part of a "Nationwide Group," or a group of corporations and entities "associated in fact" *Id.* at 642. When Richmond failed to purchase her own insurance, Cassel and Nationwide Acceptance sent her a notice telling her that they obtained the required insurance in her behalf from Balboa Insurance Company. *Id.* at 641.

812. *Id.* at 641.

813. *Id.* at 642 n.2.

814. *Id.* at 642.

815. *Id.*

816. The district court determined that the amended complaint's identification of its two "enterprises" was far too cursory and conclusory. "Richmond cannot meet the demands of RICO just by naming a string of entities that assertedly make up an 'association in fact' even though under proper circumstances such an association can indeed be an 'enterprise' for RICO purposes." *Id.* at 644.

817. *Id.*

818. *Id.* at 646.

819. *Id.* (citing *Haroco*, 747 F.2d at 401-02).

§ 1962(c).”<sup>820</sup> The Seventh Circuit, however, rejected her argument, maintaining that the complaint did not adequately identify an association-in-fact that was meaningfully different in the RICO context from the economic units that made it up.<sup>821</sup> Citing *Reves*, the court observed that “liability depends on showing that the defendants conducted or participated in the conduct of the ‘enterprise’s affairs,’ not just their own affairs.”<sup>822</sup> “[N]o showing [was alleged, the court found,] that other members of the alleged association in fact participated in the fraud, or that the persons, Nationwide Acceptance and Cassel, conducted the affairs of either the alleged enterprises (rather than their own affairs) through a pattern of racketeering activity, as required by *Reves*.”<sup>823</sup> Her complaint, therefore, failed to allege an enterprise separate and distinct from the persons sought to be held liable; it also fell short of § 1962(c)’s requirement, as elucidated in *Reves*, that the defendants “conducted or participated in the conduct of the enterprise’s affairs, not just their own affairs.”<sup>824</sup>

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820. *Id.* at 646.

821. The Court observed:

A RICO complaint must identify the enterprise. . . . An enterprise “must be more than a group of people who get together to commit a ‘pattern of racketeering activity,’ ” . . . and more than a group of associated businesses that “are operated in concert” under the control of one family. “The hallmark of an enterprise is a ‘structure.’ ” There must be “a structure and goals separate from the predicate act themselves.” An enterprise can be formal or informal; there need not be much structure, but the enterprise must have some continuity and some differentiation of the roles within it. . . . There must also be “a common purpose of engaging in a course of conduct,” . . . although the motive for the enterprise need not be an economic one. . . .

This complaint lists the three defendants as part of “nationwide Group,” a group that “includes at least” four other entities, and that may include other businesses. . . . The second enterprise, Nationwide Group plus unnamed car dealers, is even less clearly identified. . . . Such a nebulous, open-ended description of the enterprise does not sufficiently identify this essential element of the RICO offense. In *Vicom* we held that a lengthy, prolix complaint was worthy of dismissal because it was not “simple, concise, and direct,” as required by Rule 8(a)(2) of the Federal Rules of Civil Procedure. The infirmity of this amended complaint, although different from the one in *Vicom*, also violates Rule 8. This amended complaint is so scanty and its allegations so vague that it too fails to satisfy the notice requirement of Rule 8. . . . Ms. Richmond’s attempts, in her appellate briefs, to elaborate on the relationship between the “enterprise” Nationwide Group and the “persons” Nationwide Acceptance and Cassel are of no avail; the pleading itself must state the essential elements of the RICO action or it is worthy of dismissal. Therefore, we agree with the district court that plaintiff’s naming of a string of entities does not allege adequately an enterprise.

52 F.3d at 645-46 (citations omitted).

While the court’s citation of authority and analysis are impeccable, its attitude toward litigation can only fairly be described as hostile. Compare *Cushik v. Edgewood Baptist Church*, 88 F.3d 902, 910 (11th Cir. 1996), in which a much more poorly drafted complaint was not upheld, but the litigant, in the interest of doing justice, was given an opportunity to replead.

822. 52 F.3d at 646.

823. *Id.* at 647.

824. *Id.* (quoting *Reves*, 507 U.S. at 184). The court observed:

Even if a complaint alleging a § 1962(c) claim adequately identifies an enterprise, it must also establish that the “person” associated with the enterprise conducted or participated, “directly or indirectly in the conduct of such enterprise’s affairs through a pattern of racketeering activity.” To

The next post-*Reves* decision in the Seventh Circuit is, in fact, hauntingly similar to *Richmond*—save only in the outcome. In *MCM Partners v. Andrews-Bartlett & Assoc.*,<sup>825</sup> a rental equipment company, MCM Partners (“MCM”) brought suit alleging that two exhibition contractors, Andrews-Bartlett & Assoc. (“A-B”) and Freeman Decorating Company (“FDC”), who staged conventions and trade shows at Chicago’s McCormick Place violated the Sherman Act and RICO, when they refused to rent forklifts and other material handling and personnel moving equipment from the plaintiff.<sup>826</sup> Reversing the district court’s dismissal of plaintiff’s claims, the Seventh Circuit properly found that the allegations of MCM’s complaint were sufficient to establish A-B’s and FDC’s violation of § 1962(c) through participation in the operation or management of the

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be liable under § 1962(c), that person “must participate in the operation or management of the enterprise itself,” [under] *Reves*. . . which means having “some part in directing those affairs,” and must be separate and distinct from the enterprise. . . . Indeed, “liability depends on showing that the defendants conducted or participated in the conduct of the ‘enterprise’s affairs,’ not just their own affairs.” [under] *Reves*. . . .

*Haroco* established that an individual corporation could not be held liable as a “person” that conducted its own affairs through a pattern of racketeering activity, but a subsidiary that had conducted the affairs of its parent corporation could be found liable under § 1962(c). When the enterprise is a corporation or distinct business entity and the person is someone managing it, we have found distinct and separate entities and accordingly have held the defendant liable. . . . xxx But when an entity is an individual who conducts his own affairs through a pattern of racketeering, there is no enterprise and hence no valid § 1962(c) RICO claim. . . . “The only important thing is that [the enterprise] be either formally (as when there is incorporation) or practically (as when there are other people besides the proprietor working in the organization) separable from the individual.” xxx In the case before us, the district court, following *Haroco*, required “that the Complaint identify. . . an ‘association in fact’ that is meaningfully different in the RICO context from the units that go to make it up,” and determined that “that has not been done here at all. . . .”

Ms. Richmond’s claim begins and ends with the fraud allegedly committed by Nationwide Acceptance and Cassel. . . . There is no showing that other members of the alleged association in fact participated in the fraud, or that the persons, Nationwide Acceptance and Cassel. . . . [Under *Reves*] liability depends on showing that the defendants conducted or participated in the conduct of the ‘enterprise’s affairs,’ not just their own affairs.” The amended complaint’s failure to present an enterprise separate and distinct from the persons sought to be held liable is a proper basis for its dismissal.

District courts in the Seventh Circuit routinely apply *Reves* to dismiss or to uphold complaints. Their decisions are of a mixed character: some thoughtful, some not. *See, e.g., A.I. Credit Corp. v. Hartford Computer Group, Inc.*, 847 F. Supp. 588, 601 (N.D. Ill. 1994) (lender’s complaint against loan broker and its officers alleging that borrowers’ financial statements were prepared by auditors acting in concert with broker and officer was “too thin a speculative thread” to support inference of participation in control or management of enterprise); *Sassoon v. Altgelt, 777, Inc.*, 822 F. Supp. 1303, 1307 (N.D. Ill. 1993) (law firm providing legal services to the alleged enterprise was not enough to support liability under § 1962(c)); *Brown v. LaSalle Northwest Nat’l Bank*, 820 F. Supp. 1078, 1082 (N.D. Ill. 1993) (bank that devised scheme to defraud customers of their right to defenses they had under federal law against bank’s collection of loans was determined to have sufficient control over the affairs of the corporate enterprise to satisfy the *Reves* standard).

825. 62 F.3d 967 (7th Cir. 1995).

826. *Id.* at 969. According to the allegations of MCM’s complaint, A-B and FDC had been coerced by O.G. Service Corporation (“OG”), a competing rental equipment company, and individuals acting on its behalf into refusing to deal with MCM. *Id.* The predicate acts alleged were violations of the § 302 of the Taft Hartley Act, 61 Stat. 136 (codified at 29 U.S. § 186).

RICO enterprise, which MCM's complaint defined as "an association-in-fact" comprised of OG, A-B, FDC and associated individuals.<sup>827</sup>

On appeal, MCM argued that even if the other defendants, such as OG and associated individuals, in fact, "managed" the enterprise, "both A-B and FDC still participated in the enterprise's operations by carrying out the directions given them."<sup>828</sup> Relying on the First Circuit's able decision in *Oreto*,<sup>829</sup> and the Third Circuit's decision equally able decision in *Jaguar Cars*,<sup>830</sup> the Seventh Circuit properly concluded that a defendant may participate in the conduct of an enterprise by "knowingly implementing decisions, as well as by making them."<sup>831</sup> As Judge Rovner stated, the question posed in the case was "whether A-B and FDC should be characterized as 'outsiders,' like the accounting firm in *Reves*, or as lower-rung participants who acted under the direction of the enterprise's upper management."<sup>832</sup> The Seventh Circuit then concluded that the facts alleged by MCM were distinguishable from those presented in *Reves*. It then properly held that A-B and FDC could be liable under § 1962(c):

Although the question is not an easy one under the facts alleged here, we think these defendants [A-B and FDC] are properly characterized as "lower-rung participants who are under the direction of management." The primary fact leading us to this conclusion is the nature of the "enterprise" MCM has depicted, as both A-B and FDC are alleged to be members of an "association-in-fact" enterprise . . . Here [unlike the situation presented in *Reves*] . . . it is difficult on the pleadings to characterize A-B and FDC as "outsiders" because they are alleged to be part of the enterprise itself. MCM also alleged that the predicate acts of racketeering were undertaken by these defendants "at the direction" of the enterprise's managers. Moreover, these defendants were vital to the achievement of the enterprise's primary goal, as only they had the ability to exclude MCM from the market by dealing exclusively with OG. Thus, even if A-B and FDC may have been reluctant participants in a scheme devised by "upper management," they still knowingly implemented management's decisions, thereby enabling the enterprise to achieve its goals.<sup>833</sup>

Would that all RICO opinions were as thoughtful and carefully crafted as Judge Rovner's decision in *MCM Partners*.

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827. *Id.* at 977. According to MCM's complaint, the purpose of the enterprise was to make OG the "exclusive provider of forklift and material handling and personnel moving equipment for all exhibition contractors at McCormick Place." *Id.* at 978 (citation omitted). MCM further alleged that all activities of A-B and FDC in relation to that enterprise were undertaken "at the direction of" one or more of the other members of that enterprise, including OG. *Id.*

828. *Id.* at 978.

829. 37 F.3d 739.

830. 46 F.3d 258.

831. *MCM Partners*, 62 F.3d at 978 (quoting *Oreto*, 37 F.3d at 750).

832. *Id.* at 979.

833. *Id.* (quoting *Reves*, 507 U.S. at 184 & n.9).

Finally, in *United States v. Maloney*<sup>834</sup> a former county circuit court judge was convicted of §§ 1962(c) and 1962(d), for taking bribes and agreeing to “fix” four cases, including three murder cases.<sup>835</sup> The bribes were accomplished through the use of a “bagman,” who acted as an intermediary between the judge and the lawyer desiring the fix. The former judge was also charged with the obstruction of justice, by means of witness tampering, in relation to the investigation of the bribes.<sup>836</sup>

On appeal, the Maloney argued that his obstruction “did not conduct the RICO enterprise through a pattern of racketeering activity under *Reves*,”<sup>837</sup> as he was conducting his “own affairs” rather than those of the enterprise, the circuit court, on which he served while taking the bribes. The endeavor to obstruct, he argued, was not a function of the judge’s position on the bench and had no effect upon it. The Seventh Circuit appropriately rejected his appeal, holding “during both conversations with [the witness], Maloney was an active judge of the Circuit Court who at least co-operated or co-managed the enterprise with the other judges.”<sup>838</sup> Further, Maloney’s actions had an effect on the enterprise, as they allowed him to preserve his position on the bench and prolonged the possibility of his fixing future cases: “Maloney conducted the affairs of the enterprise when he attempted to obstruct justice.”<sup>839</sup> After *Grubb* in the Fourth Circuit and *Maloney* in the Seventh

834. 71 F.3d 645 (7th Cir. 1995).

835. The predicate offenses were 18 U.S.C. § 151 (color of law extortion) and 18 U.S.C. § 1503 (obstruction of justice). One of the murder prosecutions involved Lenny Chow, “a hit man for the On Leorg crime organization.” *Id.* at 650. The fix was arranged through corrupt political leaders in Chicago’s First Ward. *Id.* The First Ward is a focus of the “West Side Block,” infamous for corruption since the days of the Kefauver investigations. ESTES KEFAUVER, CRIME IN AMERICA 86-88 (1951); JOHN KOBLER, CAPONE 38 (1971); WILLIAM BRASHLER, THE DON: THE LIFE AND DEATH OF SAM GIANCANA 215-18 (1977).

836. *Id.* at 658. Maloney also argued that the omnibus clause of § 1503 (“obstruct. . . due administration of justice”) after the enactment of 18 U.S.C. § 1512 (witness intimidation) in 1982 no longer applied to witness tampering. The court reject Mahoney’s argument. 75 F.2d at 659 (citing *United States v. Rovetuso*, 768 F.2d 809, 823 (7th Cir. 1985) (no implied repeal), *cert. denied*, 474 U.S. 1076 (1986)). Maloney also argued that his obstruction of justice was post-conspiracy conduct that did not extent the statute of limitation for RICO under *Grunewald v. United States*, 353 U.S. 391 (1975). This argument, too, was rejected. 71 F.2d at 659-60. Nor was his cognate argument accepted that the obstruction of justice was not part of the charged pattern of racketeering activity, since it was not related to the bribes. *Id.* at 661-62. Maloney’s obstruction of justice points—statute of limitations and pattern—are more successful in civil RICO appeals. *See, e.g.* *Midwest Grinding Co. v. Spitz*, 976 F.2d 1016, 1024 (7th Cir. 1992) (cover-up activities did “nothing to extend the duration of the underlying diversion scheme”); *Pyramid Sec. Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1117 (D.C. Cir.), *cert. denied*, 502 U.S. 822 (1991) (no pattern on continuity grounds based on attempted coverup of conspiracy to commit securities fraud). Maloney also unsuccessfully objected to the required RICO commerce showing relying on *United States v. Robertson*, 115 S. Ct. 11732 (1995) and *United States v. Lopez*, 115 S. Ct. 1624 (1995). *Id.* 662-64. Judge Ripple dissented, among other things, on the statute of limitation point; he had the better of the argument. *See* 71 F.3d at 667.

837. *Id.* at 660.

838. *Id.* at 661 (citing *United States v. Grubb*, 11 F.3d 426 (4th Cir. 1993). *See supra* note 755. The first conversation occurred after a case conference in Maloney’s chambers, which the witness had been bound under the authority of the circuit court to attend. The second also took place at the courthouse. The Judge chose to confront he witness at the courthouse so as not to draw unnecessary attention to them. *Id.*

839. *Id.*

Circuit, public office holders will have a difficult time successfully raising *Reves* arguments in public corruption cases.<sup>840</sup>

840. *LaSalle Bank Lake View v. Segubon*, 54 F.3d 387 (7th Cir. 1995) requires brief comment and merits condemnation. In *LaSalle Bank Lake View*, a former teller manager and her husband were sued under RICO for embezzling \$940,000 over a twelve year period. Because the couple was under investigation, they claimed their privilege against self-incrimination in response to the bank's motion for summary judgment, which the district court then granted. The Seventh Circuit, in an uncharacteristically ill-advised and careless opinion by Judge Rovner, reversed, holding that under *Baxter v. Palmigiano*, 425 U.S. 308, 316 (1976), more than the mere assertion of the privilege was required. In fact, the district court acted on more than the invocation in granting the motion. 851 F. Supp. at 339 ("Because the Bank has presented substantial evidence of its allegations against. . .[the couple,] the court may draw negative inferences from. . .[their] assert of the Fifth Amendment privilege"). "[W]ithout the benefit of any analysis by either the district court or the parties," 54 F.3d at 343, Judge Rovner then unwisely commended to the attention of the district court on remand of the ill-advised dicta of *Jaguar Cars*. See *supra* note 720 *et. seq.* Based on *Jaguar Cars*, Judge Rovner expressed doubt that the bank could be an enterprise, as it was a victim entity. *Id.* at 393. She also questioned whether the teller's conduct met the *Reves* management or operation test. *Id.* at 394. Her dicta was itself improper, as she herself well-knew. *National Paint & Coat Assoc. v. City of Chicago*, 45 F.3d 1124, 1134 (7th Cir.) (Rovner, J., concurring) (if issue is not briefed, court ought to "refrain from comment" on it), *cert. denied*, 115 S. Ct. 2579 (1995). It was also inconsistent with prior Seventh Circuit precedent, albeit pre-*Reves* and *Now*. See, e.g., *United States v. Kovic*, 684 F.2d 512, 516-17 (7th Cir.) ("[I]t is [no] less a violation of RICO because the Police Department as the governmental enterprise, the non-participating vendors, and the citizens of Chicago were all victims of Kovic's illegal conduct."), *cert. denied*, 459 U.S. 972 (1982). Nothing in *Reves* or *Now* purported to overrule *Kovic*. *Viola*, 35 F.3d at 41, noted at 54 F.3d at 394, is not good authority even with a "cf." cite to apply *Reves* to exclude the couple from responsibility for the embezzlement: a knowledgeable culpable assistant teller manager is hardly to be compared to an unknowledgeable maintenance worker. The dicta were not only regrettable, but hardly characteristic of Rovner, who is usually a careful, thoughtful, and accurate jurist. They stand in sharp and unfavorable contrast with her able opinion in *MCM Partners*. When the appeal returned to the district court, the dicta were not followed. 437 F.Supp. 1309 (N.D. Ill. 1996) (*Jaguar* rejected).

See also *Arenson v. Whitehall Convalescent and Nursing Home, Inc.*, 880 F.Supp. 1202 (N.D.Ill. 1995), in which the executor of a nursing home resident's estate sued the nursing home and its president, alleging that the nursing home and the drug supplier cheated the residents on the cost of pharmaceutical supplies. The district court dismissed the RICO count against the nursing home; it upheld the RICO claim against the president. Citing *Reves*, the district court indicated that "allegations of a simple supplier-purchaser relationship are insufficient to allege that . . . participated in the operation or the management of. . .[the drug supplier]." 880 F.Supp. at 1209. The nursing home, as the purchaser of supplies, was not operating or managing the supplies. Nevertheless, when the president of the nursing home was the "person," and Whitehall was the "enterprise," the president participated in its operation or management.

Similarly, in *Buck Creek Coal, Inc. v. United Workers of America*, 917 F.Supp. 601, 613 (S.D.Ind. 1995), the district court dismissed the RICO claims of coal mine operator against its union. The *Reves*' test is not met, it held, by "[v]ague and conclusory allegations that the Persons conducted or participated in the conduct of the enterprise through actions taken by unnamed persons at unspecified times and places. . . ."

Similarly, in *Resolution Trust Corporation v. S & K Chevrolet Company*, 918 F.Supp. 1235 (C.D.Ill. 1996), after discussed the developing *Reves* jurisprudence, the Court concluded:

[T]he Court finds that Plaintiff's complaint fails to adequately allege the participation of Reiman in the management or operation of the alleged enterprise, S & K Chevrolet. Reiman is not alleged to be a manager or employee of S & K; rather, he is an outside insurance agent who provided services to S & K during the course of its alleged scheme to defraud. The Complaint alleges that Reiman provided insurance binders in exchange for money from S & K even though he knew that the borrowers were highly unlikely to maintain their insurance premiums. . . In the end, Reiman was merely providing services to the enterprise when he issued the insurance binders. . . Even if by providing such services, Reiman implicitly "encouraged S & K and its employees to pursue the scheme, this is not enough to show that Reiman actively directed or controlled the enterprise itself. Reiman's actions are too passive to have done so.



### I. The Eighth Circuit

The Eighth Circuit, the source of the “operate or manage” test, considered two post-*Reves* decisions. The first fell unthinkingly into treating the *Reves* rule as if it were a per se exclusion from liability under RICO of attorneys, though, on the facts stated in the opinion, making a judgement that alternative theories of liability were available is difficult. The second, a criminal appeal, is a straight-forward application of the circuit’s own test, as explicated in *Reves* itself.

In *Nolte v. Pearson*,<sup>841</sup> investors in a master music recording leasing program brought suit against the Rosenbaum law firm and its members who represented Music Leasing Company.<sup>842</sup> The law firm prepared various leasing documents for the music company regarding the investor’s income tax consequences. In return for their investments, plaintiffs were to receive income tax credits, but the Internal Revenue Service disallowed the credits and the lawsuit followed.<sup>843</sup> Plaintiffs claimed that the law firm violated § 1962(c) through acts of racketeering activity involving mail and wire fraud. The district court found no evidence that the documents prepared by the firm were ever mailed or that they contained fraudulent information; it, therefore, dismissed the claim. The Eighth Circuit decided the appeal, not on the mail fraud issue, but by finding that the record was “devoid of evidence that the defendants participated, either directly or indirectly, in the conduct of the affairs of the enterprise.”<sup>844</sup> The court commented that its “operation or management” test was affirmed, while the appeal was pending, in *Reves*; it then concluded—without additional analysis—that “[t]he conduct of the defendants . . . [was, as in *Reves*,] insufficient to impose liability as there [was] no evidence suggesting that the attorneys participated in the operation or management

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Accordingly, the Court dismissed the § 1962(c) claim. Significantly, however, it recognized that a claim under § 1962(d) could be maintained, but it held that it was not adequately plead.

841. 994 F.2d 1311 (8th Cir. 1993).

842. *Id.* at 1314.

843. *Id.* at 1315. The district court granted a directed verdict in favor of the law firm on each of the plaintiffs’ claims, which included fraud, negligent misrepresentation, and RICO. *Id.* 1314. Without objection by the plaintiffs, the district court applied the clear and convincing standard of proof to the state fraud claim on a motion for a directed verdict after the plaintiffs concluded presenting their evidence. Nothing that the proper standard of proof for fraud in Nebraska is preponderance of the evidence, the Eighth Circuit treated the ruling as “the law of the case.” *Id.* at 1315. It declined to revisit the question as an “exceptional” circumstances issue. *Id.* (citing *Gregory v. Honeywell Inc.*, 835 F.2d 181, 184 (8th Cir. 1987) and *Hornel v. Helvering*, 312 U.S. 552, 558 (1941)). The court of appeals agreed with the district court that plaintiff produced no direct evidence of fraud in the attorneys opinion, and it declined to accept the plaintiff’s circumstantial evidence of “must have” known evidence. *Id.* (“unsupported conclusion and speculation are insufficient”). The court also rejected the negligence misrepresentation claim, not because of a failure of proof on misrepresentation, but because plaintiffs failed to establish justifiable reliance. *Id.* at 1317-18 (based on warning in the opinion letter, which raised “red flags”). The court did not discuss the possibility of civil aiding and abetting or civil conspiracy liability between the firms and the Music Leasing Co. Apparently, the theories were not litigated by the parties in the district court.

844. *Id.* at 1317 (citing *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957) (reviewing court can affirm trial court for any reason supported in the record)).

of the enterprise.”<sup>845</sup> Accordingly, the court affirmed the entry of a directed verdict in favor of the law firm.<sup>846</sup> Absent evidence in the record that would warrant examining alternative theories, aiding and abetting or conspiracy, between the lawyers and the music company, the result is unobjectionable. The opinion, furthermore, does not contain sufficient facts to make a judgment on the alternative theory of treating the law firm, rather than the music company, as the enterprise, putting to one side the crucial issue of fraud itself, for if no fraud was present, the RICO issue is immaterial. Here, too, the court cannot be faulted.

The Eighth Circuit also considered the *Reves* issue in *United States v. Darden*.<sup>847</sup> A more complex appeal than *Nolte*, but an appeal nonetheless easily resolved on the law. In *Darden*, the defendants were convicted of various RICO violations, §§ 1962(c), 1962(d), in connection with a drug trafficking enterprise.<sup>848</sup> On appeal,

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845. *Id.*

846. *Id.* See also *Nebraska Sec. Bank v. Dain Bosworth, Inc.*, 838 F. Supp. 1362 (D. Neb. 1993), in which the defendant, who served as an underwriter and fiscal agent for the corporation/enterprise, sold warrants that it allegedly knew were destined for default. Since it exercised the right to control the interest rate of the warrants, the court found that entry of summary judgment in its favor on the § 1962(c) claim was not justified because “[t]he decision regarding what rate of interest a corporation is willing to pay on its securities is central to the operation or management of the corporation.” *Id.* at 1367. Further, the court rejected the argument that plaintiffs had to prove that the fiscal agent used “undue means,” such as bribery, to gain control of the enterprise; instead, it found that they need only show “some” control over the RICO enterprise, “regardless of whether such control is acquired legally or otherwise.” *Id.*

847. 70 F.3d 1507 (8th Cir. 1995). For a recent district court decision on *Reves*, see *Reynolds v. Condon*, 908 F. Supp. 1494 (N.D. Iowa 1995), in which the former husband brought racketeering charges, § 1962(c) and § 1962(d), against his former wife, her attorney, and the attorney’s law firm, for allegedly threatening to bring prosecution against the former husband for sexual abuse of their children, if he would not stipulate to a divorce settlement in favor of his former wife. The district court rejected the plaintiff’s argument on a notion to reconsideration that the court erred in applying the “operation or management” to all of the defendants, including both “insiders” and “outsiders.” The plaintiff argued that the *Reves* standard was applicable only to “outsiders,” not to “insiders,” such as the partner in the law firm identified as the enterprise. The district court held that *Reves* did not distinguish between legal standards for “insiders” and “outsiders.” Further, the court held that “the mere allegation that someone is a partner in a law firm . . . does not mean that everything that the partner does is conducting the affairs of the law firm. . . . [T]he attorney’s status as a partner does not mean that she conduct[ed] the affairs of the law firm by acting in a managerial capacity, through racketeering activity.” 908 F. Supp. at 1530. Accordingly, absent a showing of multiple law suits or similar facts, “[o]ne attorney acting on behalf of one client or set of clients in a single lawsuit is an attorney conducting the affairs of the clients. . . [not] the affairs of the law firm.”

848. Jerry Lee Lewis was convicted for participating in and becoming “the leader of a powerful criminal racketeering enterprise,” which controlled, for over ten years, “a large percentage of the market for T’s and Blues (a heroin substitute), heroin, and cocaine in north St. Louis.” 70 F.3d at 1516. Lewis attained and kept his position by murder; he operated his “long-term, violent drug-trafficking enterprise” (known as “JLO,” the “Jerry Lewis Organization”) behind “a facade known as the Subordinate Temple No. 1 of the Moorish Science Temple of America,” a sect of American Islam. *Id.* at 1516 n.1. Several defendants were convicted, including Lewis; two were found not guilty. *Id.* at 1517. The trial last nine months, one of the longest trials in the history of the Eastern District of Missouri. *Id.* Lewis lost on appeal his arguments that the government failed to establish a single enterprise, even though its membership varied. *Id.* at 1520. Other defendants lost their arguments that a distinct structure was not shown, *id.* at 1521 (the government “need not introduce the enterprise’s by-laws or certificate of incorporation”; evidence of oversight and coordination as well as “post-shooting reviews to improve the techniques it employed to snuff out rival and informants” was sufficient), as well as miscellaneous other arguments, including membership; pattern; statute of limitations; severance; co-conspirator declarations; anonymous jury; security measures at the trial; and use of evidence of unindicted crime. *Id.* at 1921-42.

Lewis and three others argued that the district court abused its discretion by giving a defective instruction concerning the elements of RICO.<sup>849</sup> They argued that the instruction was defective for two reasons. First, the district court omitted “in the conduct of” on three occasions by referring simply to the “participation in the affairs” of the enterprise instead of “participation in the conduct of the affairs.”<sup>850</sup> Second, they claimed the district court directly contradicted *Reves* by instructing that “a person may participate in the conduct of an enterprise even though he had no part in the control of the enterprise.”<sup>851</sup>

The Eighth Circuit rejected the first argument by stating that the omission of the words “in the conduct of” did not eliminate the necessary element of direction, since the phrase was used correctly on three separate occasions. Further, the court noted that the “operation and management test” was an easy-to-apply formulation of the requirement of proof that the defendant possessed “some part in directing the enterprise’s affairs.”<sup>852</sup> The guidelines on “operation or management” given by the district court adequately reflected the law, the court held, since it “clearly inform[ed] the jury that some participation in the operation and management of the enterprise . . . [was] required . . . [and] that this requirement does not limit criminal liability to an enterprise’s top managers or policy makers.”<sup>853</sup>

Concerning the second argument, the Eighth Circuit responded that when the district court stated that “a person may participate in the conduct of an enterprise even though he had no part in the control of the enterprise,” it did not err. The Supreme Court, the circuit observed, did not state that the word “conduct,” when used as a verb, suggests “control.” Instead, the court held that the “government must prove some part in the direction, not control, of the enterprise’s affairs, and then went on to state that this court’s operation-and-management test is a proper formulation of that requirement.”<sup>854</sup> Thus, the district court’s instructions properly

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849. The defendants challenged the jury instruction on the elements of RICO that stated:

The fourth element which the government must prove beyond a reasonable doubt is that the defendant conducted or participated, directly or indirectly, in the affairs of the enterprise. The terms “conduct” and “participate in the affairs” of an enterprise means [sic] the performance of acts, functions, or duties that are necessary or helpful to the operation of the enterprise. To “conduct or participate, directly or indirectly in the conduct of the enterprise’s affairs,” one must participate in the operation or management of the enterprise itself. An enterprise is operated not just by upper management. An enterprise is also operated by lower-rung participants who are under the direction of upper management. The terms “conduct” and “participate in the affairs” of an enterprise include the performance of acts, discharge of duties that are necessary or helpful to its operation. A person may participate in the conduct of an enterprise even though he had no part in the control of the enterprise, and even though he had no share in any of its profits. But the participation must be knowing as defined in these instructions.

*Id.* at 1542.

850. *Id.*

851. *Id.*

852. *Id.*

853. *Id.* at 1543.

854. *Id.*

distinguished between the “nonliability of mere participants in the enterprise and the liability of operators and managers.”<sup>855</sup>

### *J. The Ninth Circuit*

The Ninth Circuit reviewed three major post-*Reves* appeals. The first was a false start, in which it treated *Reves* as a per se exclusion or safe harbor, though it recognized the unaffected character of § 1962(d). That decision was followed by a quick, decisive, correct, but unpublished affirmation of the proper scope of § 1962(d). Unfortunately, that proper result was followed by an unjustified and unjustifiable extension of its initial false start—that puts the Ninth Circuit in the sad position of taking *Reves* further toward the creation of a safe-harbor under RICO for erring service providers—accountants and lawyers—than any of the other circuits.

*Reves* was first considered by the Ninth Circuit in *Baumer v. Pachl*,<sup>856</sup> where the plaintiffs were investors in a California limited partnership known as “Golden Hills Estates.”<sup>857</sup> The complaint charged violations of §§ 1962(c).<sup>858</sup> The partnership was formed by Emery Erdy and a California Corporation, Estate Planning Associates, Inc. (“EPA”). Erdy and EPA sold fractional partnership interests to the public in transactions that were later determined by the California Department of Corporations to constitute illegal sales of unregistered securities.<sup>859</sup> Following this determination, Erdy and EPA sought the help of James Pachl, an attorney, who undertook numerous efforts to keep the illegal sales scheme alive. On two occasions, Pachl wrote deceptive letters to the Department of Corporations, and he also knowingly filed a false partnership agreement in order to create the impression that Golden Hills was formed in compliance with the law.<sup>860</sup> Similarly, Erdy and EPA enlisted the help of Gordon Yow, a licensed real estate appraiser, who appraised the property value of Golden Hills at five million dollars, thereby enhancing its image to investors. In fact, Yow disregarded numerous geological and zoning considerations that significantly affected the market value of the property.<sup>861</sup> Pachl was charged in the investors’ complaint for violating § 1962(c), and both Pachl and Yow were alleged to have violated § 1962(d).<sup>862</sup> The district court dismissed both counts.

On appeal, the Ninth Circuit held that Pachl’s involvement in the limited partnership did not meet the “conduct or participation” requirement of § 1962(c).

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855. *Id.*

856. 8 F.3d 1341 (9th Cir. 1993).

857. *Id.* at 1342.

858. *Id.* The predicate offenses were mail and securities fraud. *Id.* at 1343.

859. *Id.*

860. *Id.* at 1342-43.

861. *Id.* at 1343.

862. *Id.*

The fraudulent scheme began in 1976, the court noted, but Pachl's involvement did not begin until 1982, "and his role thereafter was at best sporadic."<sup>863</sup> The court also pointed out that at no time did Pachl ever hold a formal position in the partnership. In short, the court found that Pachl played no part in directing the affairs of the enterprise but, instead, "was limited to providing legal services to the limited partnership and EPA . . . [w]hether Pachl rendered his services poorly, properly or improperly, is irrelevant to the *Reves* test."<sup>864</sup> Accordingly, the § 1962(c) claim against Pachl failed under the "operation and management" test.<sup>865</sup>

As a statement of liability under *Reves* as a principle in the first degree, the court's holding is unremarkable; the court's failure to consider more thoroughly aiding and abetting or conspiracy liability is, however, unjustifiable.<sup>866</sup> The court, moreover, compounded its mistake when it affirmed the dismissal of the RICO conspiracy claims against Pachl and Yow. The investors' complaint had alleged that both defendants knowingly aided and abetted Erdy and EPA in their conduct of affairs of Golden Hills through a pattern of racketeering activity, conduct that manifested on their part a conspiracy in violation of § 1962(d).<sup>867</sup> The Ninth Circuit appropriately observed, "proof of an agreement which is a substantive violation of RICO (such as conducting the affairs of an enterprise through a pattern of racketeering) is sufficient to establish a violation of § 1962(d)."<sup>868</sup> Nevertheless, the court observed, when allegations of such an objective are lacking the complaint "must establish the defendant's participation or agreement to participate in two predicate offenses."<sup>869</sup> The Ninth Circuit then cited Seventh Circuit

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863. *Id.* at 1344.

864. *Id.*

865. *Id.* (citing *University of Maryland v. Peat Marwick, Main & Co.*, 996 F.2d 1534, 1539 (3rd Cir. 1993)). The court also recognized that it was acting on a basis not considered by the district court. *Id.* at 1345.

866. The court merely observed:

On page 30 of their 32-page opening brief appellants relate without elaboration that "Aiding and abetting the primary malefactors is sufficient to impose liability under either section 1962(c) or 1962(d). . . . We note that there is some support among the Circuits for the imposition of aider or abettor liability in the civil RICO context. For some time the courts have found RICO liability on the basis of aiding and abetting in the criminal RICO context. We also note that positive reference in the form of *obiter dictum* was made to [the issue] in *Oscar v. Univ. Students Co-op Ass'n* [decision]. . . .

This being said, the instant case does not require that we address whether appellants have stated a claim on the basis of aider or abettor liability.

*Id.* at 1347 (citations omitted) (commenting in n.8 "The Third Circuit failed to specify whether criminal or civil aiding and abetting concepts apply. . . ."). The duty to do substantial justice, in fact, required the court to consider both aiding and abetting and conspiracy liability. Its failure to consider these questions is only marginally mitigated by its observation on the conspiracy issue that the "district court provided appellants repeated opportunity to amend the complaint, opportunities not pursued." *Id.* at 1347 n.7 Pleading ought not be a game of skill—nothing more. See *supra* note 608.

867. *Baumer*, 8 F.3d at 1345.

868. *Id.*

869. *Id.*

precedent in support of its conclusion that “a defendant who. . . [does] not agree to the commission of crimes constituting a pattern of racketeering activity is not in violation of § 1962(d), even though he is somehow affiliated with a RICO enterprise, and neither is the defendant who agrees to the commission of two criminal acts but does not consent to the involvement of an enterprise.”<sup>870</sup> The court also referred to its prior decision in *United States v. Brooklier*,<sup>871</sup> in which it held that a RICO conspiracy “requires the assent of each defendant who is charged, although it is not necessary that each conspirator knows all of the details of the plan or conspiracy.”<sup>872</sup> Unfortunately, the court then found that no basis in the allegations of the complaint to infer assent to contribute to a common enterprise, a result that drains the teachings of *Conley* of all vitality and failed to do substantial justice to the victims of a substantial fraud. Accordingly, the court concluded that “the complaint is legally deficient with regard to the § 1962(d) conspiracy-based claims against both Yow and Pachl because it fails to allege adequately that they acted in the capacities of conspirators, as opposed to aiders and abettors.”<sup>873</sup>

Between two wrongly decided appeals on *Reves* issues, the Ninth Circuit got the issue right in *In Re Am. Continental Corp./Lincoln Sav. & Loan Sec. Litig.*<sup>874</sup> in which the court appropriately affirmed a multi-million dollar judgement under RICO against a strawman, who engaged in a series of sham real estate transactions. The court concisely commanded:

Wolfswinkel’s claim that he is not subject to RICO treble damages even though he was found to have been a RICO coconspirator is otiose. His citation to *Reves* . . . does not advance his cause. That case did not hold that someone who enters into a RICO conspiracy can avoid treble damages simply because he is not a part of management. It merely determined what was meant by operating or managing a RICO enterprise for the purpose of deciding whether there was any RICO liability at all.

Would that the panel had published its opinion. Its refreshingly forthright and decidedly commendable spirit is not reflected in its published opinions.

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870. *Id.* at 1346 (citing *Neapolitan*, 791 F.2d at 499 (footnote omitted)).

871. 685 F.2d 1208, 1222 (9th Cir 1982), *cert denied*, 459 U.S. 1206 (1983).

872. *Baumer*, 8 F.3d at 1346.

873. *Id.* at 1347. See also *Tonnemacher v. Sasak*, 859 F. Supp. 1273 (D. Ariz. 1994), in which an outside accounting firm engaged in a fraudulent scheme to obtain money by deception through the issuance and sale of limited partnership units. The district court found that the firm did not participate in the operation or management of the enterprise (the hiring partnership); it was, therefore, not liable under § 1962(c): “[w]hether accounting services are performed competently or incompetently, properly or improperly, is irrelevant to the *Reves* analysis.” *Id.* at 1276. The court also found no liability under § 1962(d), but properly noted that “if the Plaintiffs can establish that [the accounting firm] intended to participate in a RICO conspiracy, [it] may be liable under 1962(d) regardless of whether [it] committed the substantive RICO offense.” *Id.* at 1278.

874. 1994 U.S. App. LEXIS 13184 (9th Cir. May 23, 1994); see *supra* note 23 *et. seq.* (discussion of *In re American Continental/Lincoln Savings & Loan Securities Litigation*).

In *Webster v. Omnitrition International, Inc.*,<sup>875</sup> its third major post-Reves decision, the Ninth Circuit looked at a possible pyramid scheme through the lens of §§ 1962(c) and 1962(d), in which it reached decidedly mixed results. The defendants ran a business superficially similar to that of Amway, known as Omnitrition, selling supplements, vitamins, and skin care products. The “multi-level marketing” plan based its commissions on amount of product ordered, not on actual sales. “Supervisors” recruited others to buy their product and to sell it, receiving bonuses based directly on their recruits placing orders. As a participant moved higher in the chain, he received more royalties from others down the line. Douglas Adkins was a partner at the law firm of Gardere & Wynne and an assistant secretary of Omnitrition; his participation in the scheme included appearing in a promotional video for the products, in which he said that the marketing program was not a pyramid scheme. The district court granted a summary judgment to the defendants on several grounds: the distributorships were not “securities,” the operation of the program was not fraudulent, no predicate acts were alleged, no enterprise beyond the alleged, racketeering activity was alleged, and several elements of state claims were lacking.<sup>876</sup>

On appeal, the Ninth Circuit reversed in part and affirmed in part. Pyramid schemes are, it wrote, “inherently fraudulent because they eventually collapse.”<sup>877</sup> Like chain letters, they make money for those at the top, but must end up disappointing those at the bottom who can find no more recruits. Under the Federal Trade Commission’s test, which the court adopted, two elements must be satisfied: the payment of money for (1) the right to sell a product, and (2) the right to receive in return for recruiting others rewards unrelated to sales of the product.<sup>878</sup> The court held that the question of whether the Omnitron program was an unlawful pyramid scheme was a triable issue of fact. “The promise of lucrative rewards for recruiting others tends to induce participants to focus on recruitment . . . at the expense of . . . retail marketing. . . .”<sup>879</sup> Accordingly, it reversed the district court’s order granting summary judgment on the securities claims.<sup>880</sup>

Turning to the RICO allegations, the court of appeals also reversed the district

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875. *Id.* at \*9.\*10

876. 79 F.3d 776, 781, 786 (9th Cir. 1996). The predicate offenses were securities fraud and mail and wire fraud. *Id.* at 786.

877. *Id.*

878. *Id.* (citing *In Re Koscot Interplanetary Inc.*, 86 F.T.C. 1106, 1181 (1975), *aff’d*, *Turner v. F.T.C.*, 580 F.2d 701 (D.C. Cir. Oil 1978)).

879. *Id.* at 782.

880. *Id.* at 784. The court classified the participants investments in the Omnitrition program as “investment contracts” under *SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946) (investment contract is a “security” under securities laws). The court affirmed the grant of summary judgment on the securities claim against Adkinson and the other attorney defendants on statute of limitations grounds, since it had to be brought within one year of the discovery of the illegal sale under *Lampf, Pleva, Lipkind, Prups & Petigrow v. Gilbertson*, 501 U.S. 350, 364 (1991). The discovery of Adkins’ allegedly false promotion video more than a year before that allegation was added to the complaint was also outside the statute. *Id.* at 788-89.

court's decision. Because a triable issue of fact was shown that the Omnitrition program was a pyramid scheme, the predicate acts of securities fraud and mail and wire fraud were also matters for the jury.<sup>881</sup> The court then found that the complaint adequately alleged an "enterprise," whose structure was ascertainable apart from the racketeering activity<sup>882</sup> and that a wholly unlawful enterprise, that is, a corporation allegedly set up to conduct illegal activities fell within RICO.<sup>883</sup> The court also appropriately rejected the intracorporate conspiracy doctrine under RICO.<sup>884</sup>

Up until this point, the court's opinion was workman-like, thoughtful, and sound. When it turned to applying *Reves* to the other showing on the motion for a summary judgment, it became mechanical and wooden. The court approached *Reves*, not only as if it were a per se exclusion for lawyers, that is, a safe harbor, but also as if it were a high managerial agent *only* rule. *Reves*, of course, requires allegations of management *or* operation; it excluded the accountants *only* on the facts of that appeal. Concededly, *Reves* was construed by the Ninth Circuit in *Bauner v. Poch*<sup>885</sup> to exclude an attorney who wrote letters, prepared a partnership agreement, and assisted in a bankruptcy proceeding. The court in *Webster* however, went further and *extended Bauner*. Even though Adkins was an officer in Omnitrition, his role, the court agreed, was "ministerial."<sup>886</sup> His statements promoting the scheme were neither management nor operation.<sup>887</sup> Nor had plaintiff produced timely<sup>888</sup> evidence that the attorney defendants conspired to violate RICO. The court correctly followed the Seventh Circuit on the intra corporate conspiracy doctrine; it also should have followed the Seventh Circuit's lead in *MCM Partners on Reves*. Sadly, the court's decision fails to do justice; it rewrites RICO, *Reves*, and general jurisprudence to create a safe harbor for lawyers who service swindlers and who are fully aware of the integral part they play in bilking the public. Even if the question of "management" is set to one

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881. *Id.* at 786. In particular, a showing of a pyramid scheme gave rise to an inference of intent to defraud, which, the court held, could be shown by circumstantial evidence and was, it said, "ill-suited for adjudication on summary judgment." (citing *Ikuno V. Yip*, 912 F.2d 306, 310 (9th Cir. 1990)).

882. *Id.* at 786. The court held that the presence of a corporation in a scheme was itself sufficient to give the enterprise a structure separate from the racketeering activity (citing *United States v. Feldman*, 853 F.2d 648, 660 (9th Cir. 1988), *cert. denied*, 489 U.S. 1030 (1989)).

883. *Id.* at 787. The argument, the court observed, "misconstrues the nature of the separate structure requirement." (citing *United States v. Riccobene*, 709 F.2d 214, 223-24 (3rd Cir.), *cert denied*, 464 U.S. 849 (1988)). Such unlawful enterprises were with the statute. (citing *United States v. Tille*, 729 F.2d 615, 620 (9th Cir.), *cert. denied*, 464 U.S. 845 (1984)).

884. *Id.* at 787 (following *Ashland Oil, Inc. v. Arnett*, 895 F.2d 1271, 1218 (7th Cir. 1989) *See supra* note [insert]).

885. *See supra* note [insert].

886. *Id.*

887. *Id.*

888. *Id.* at 790 n.11 ("None of the proposed evidence or discovery materials relate [sic] to whether Adkins was conspiring to participate in Omnitrition's operation or management or establish [sic] plaintiff's securities claims were *timely* filed against the Attorney Defendants") (emphasis added).



side—and it need not be set aside, as the test for operation or management is the same for one who takes direction from another who is concededly a manager, whether he is classified as an outsider or an insider—the promotional video was an essential aspect of the successful operation of the fraudulent scheme. Simply because he is a lawyer, Adkins need not be classified as an outsider; he can just as easily be viewed as an insider, as in *MCM Partners*; as an attorney for, and officer of, the corporation, his conduct was, at the least, performed as an insider in the “operation” of the enterprise at the direction of the others who were unquestionably its managers; it was hardly the unknowing contribution of a maintenance worker, as in *Viola*.<sup>889</sup> *Reves* expressly recognizes that those down the line within an enterprise may be responsible.<sup>890</sup> Merely because Adkins was licensed to practice law ought not cloak him with immunity. If anything, his status as a member of the bar ought to result in his being held to a higher standard.<sup>891</sup> Adkins was not the outsider, who may legitimately evoke our sympathy, who provides legitimate legal or accounting services to an enterprise that was—unknown to him—corrupt. Classify him as either an outsider or an insider, either way he ought to have been held responsible under RICO for his fraudulent conduct. Unquestionably, a triable issue of fact was before the court, as to the responsibility of Adkins, at least, as a principal in the first degree in the operation of the scam. That Adkins was also easily categorized as an aider and abetter, which the court never considered, or a coconspirator, which it wrongfully passed off as if it were no issue at all. *Webster*—on the *Reves* holding—is a shameful miscarriage of justice.<sup>892</sup>

### K. The Tenth Circuit

The Tenth Circuit decided only one post-*Reves* appeal; fortunately, it got it right on all aspects of the decision. *Resolution Trust Corp. v. Stone*<sup>893</sup> arose out of the purchase by a savings and loan of close to \$10 million in automobile loan papers, known as “enhanced automobile receivables” (“EARs”).<sup>894</sup> One of the defen-

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889. Compare *supra* note 824 (*MCM Partners*), with *supra* note 628 (*Vida*).

890. See *supra* text at note 628.

891. See, e.g., *United States v. Stites*, 56 F.3d 1020, 1022 (9th Cir. 1995) (RICO conviction; defendant “mastermind[ed] a massive set of breaches of professional responsibility and criminal law, the more *heinous* because. . . [he] was a lawyer and at least twelve other lawyers were his principal confederates in carrying out the fraud”) (emphasis added).

892. See also *Chang v. Chen*, 80 F.3d 1293, 1301 (9th Cir. 1996) (coconspirator in fraudulent land transactions not employed by, but associated with, real estate firm in scheme using straw purchases to inflate the appearance of value not shown to be part of management or operation of firms; aiding and abetting and conspiracy not considered) (citing *Reves*, 507 U.S. at 177-78); *Pedrina v. Chun*, 906 F. Supp. 1377 (D. Hawaii 1995) (allegations that the mayor of a city violated RICO by assisting a country club in seeking a conditional use permit and by accepting bribes were insufficient to satisfy the operation or management test; participation in the granting of the permit did not establish a management role; no allegations that the mayor sought to control the country club or its operations).

893. 998 F.2d 1534 (10th Cir. 1993).

894. *Id.* at 1536. EARs are car loans that are purchased from automobile dealers, are repackaged to include certain enhancements that insure collectability, and are then resold on the secondary market. *Id.*

dants, Progressive Acceptance Corporation ("PAC"), created the EARs by purchasing consumer automobile notes from car dealers, repackaging them with additional features, and selling them to purchasers, including Standard Federal Savings Bank, the original plaintiff.<sup>895</sup> Approximately \$200 million worth of EARs were sold. "PAC had not purchased insurance for the EARs as it had promised, . . . had not funded certain promised reserves, and . . . it was not meeting certain contractual obligations associated with servicing and payment of money to purchasers."<sup>896</sup> In the ensuing, multi-count, RICO lawsuit, PAC, which filed for bankruptcy and avoided trial,<sup>897</sup> was named as a defendant, along with the Professional Investors Insurance Group, Inc. ("PIIGI"), its parent company and Alexander Stone, the chief executive officer of PAC, and PIIGI. PIIGI was found liable on three counts under §§ 1962(c) and 1962(d).<sup>898</sup> Only PIIGI appealed.<sup>899</sup> It argued a variety of RICO related and other claims of error, including that EAR's were not securities, that PIIGI did not participate in the management or operation of the enterprise, and that an association-in-fact of all of the defendants and a pattern of racketeering activity were not shown.<sup>900</sup> On appeal, the Tenth Circuit held that the EARs were not securities; accordingly, it reversed the securities-based RICO judgments.<sup>901</sup> Turning to PIIGI's challenge that it did not "participate in the conduct of the enterprise," the court recognized that *Reves* adopted the Eighth's Circuits management or operation test.<sup>902</sup> The plaintiff alleged that the RICO enterprise was an association-in-fact of all of the defendants.<sup>903</sup> The essence of the enterprise, the court observed, was the fraudulent and deceptive sale of EARs to Standard Federal and others.<sup>904</sup> Applying the *Reves* test, the Tenth Circuit found abundant evidence to warrant the jury finding that PIIGI participated in the conduct of the enterprise.<sup>905</sup> The court marshalled the evidence, including that Stone was the chairman of the board and chief executive operating officer of both PAC and PIIGI, that the comptroller of PAC reported to the chief financial officer of both PAC and PIIGI,

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895. *Id.* Standard Federal Savings Bank was the savings and loan that bought the EARs; it was, however, declared insolvent after the trial, and the Resolution Trust Corporation was substituted as conservator for Standard Federal's successor, Standard Federal Savings and Loan Association. *Id.*

896. *Id.* at 1537. The predicate offenses were securities fraud and wire and bank fraud. *Id.*

897. PAC subsequently filed for bankruptcy and, therefore, was not a defendant at trial. *Id.* at 1534.

898. *Id.* at 1537.

899. *Id.* at 1536. It was found liable on a variety of other RICO and related counts. *Id.*

900. *Id.* at 1537.

901. *Id.* at 1537-38. The court determined that the EAR's were neither "notes" nor "investment contracts." (citing *Reves v. Ernst and Young* (*Reves I*), 494 U.S. 56, 65 (1990) (defining "notes") and *SPC v W.J. Howey*, 328 U.S. 293, 299 (1946) (defining "investment contracts")).

902. *Id.* at 1541.

903. The defendants were PAC, Alexander Stone, Union Planters Corporation, Union Planters National Bank, and the "IBG defendants," consisting of Union Planters Investment Bankers Corporation, Union Planters Investment Bankers Group, Inc., and Investment Group Mortgage Corporation. All but PIIGI voluntarily dismissed their appeals. *Id.* at 1536.

904. *Id.* at 1942.

905. *Id.* at 1542.

and that the only PAC employees authorized to sign checks for PAC were also officers or employees of PIIGI. The court reasoned, "the jury could infer that PIIGI, through this close relationship, was participating with PAC in the conduct of the RICO enterprise."<sup>906</sup> PIIGI was also, the court found, intimately involved with other defendants that composed the "association in fact" enterprise: PIIGI and the IBG defendants entered into an Automobile Loan Funding Agreement ("ALF"), under which PIIGI obtained nearly \$74,000 in connection with PAC's December 1988 sale of EARs to Standard Federal, and the ALF agreements were used to finance PAC's purchase of the car loans that became EARs. The court, therefore, properly concluded, "looking at the evidence and inferences in the light most favorable to the plaintiff, we hold that there is sufficient evidence to support the jury's finding that PIIGI participated in the conduct of the RICO enterprise."<sup>907</sup> No other result would have been legally defensible.

### L. The Eleventh Circuit

The Eleventh Circuit grappled with only one post-*Reves* appeal. Like the Tenth Circuit, it, too, fortunately got it right. In *United States v. Starrett*,<sup>908</sup> it affirmed the RICO convictions of six defendants who participated, or agreed to participate, in the affairs of a motorcycle gang known as the "Outlaw Motorcycle Club."<sup>909</sup> At

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906. *Id.*

907. *Id.* The court, too, did not have trouble finding that a pattern of racketeering activity was shown (citing *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 236-37 (1989)). Here, it considered "extensiveness" crucial in satisfying the continuity as part of the court's two prong test: relationship and continuity. *Id.* at 1543-45 (looking to the number of victims, the number of predicate acts, the variety of predicate acts, the presence of distinct injuries, the complexity and size of the scheme, the nature of the enterprise, and the duration of the scheme (up to 18 months)). The court was also not troubled by a charge of inconsistency in the jury's verdicts, as no objection was made in the district court; it found the verdict general and not special; unless an objection was made when they were returned, it, too, was waived. *Id.* at 1545-47.

In *Brooks v. Bank of Boulder*, 891 F. Supp. 1469 (D. Colo. 1995) (Kane J.) investors in a Ponzi and check kiting schemes sued the bank and bank officials under RICO and the Colorado Organized Crime and Control Act (COCCA). Colo. Rev. Stat. Ann. §§ 18-17-101 to 109 (West 1990 & Supp. 1994, 1995). The investors alleged that the bank discovered the scheme, run by M & L Business Machines Co. ("M & L"), but did not report it or alert investors because it wanted to minimize its own losses. Dismissing the complaint, district court noted that § 18-17-04(e), was modeled after § 1962(c); it then mistakenly concluded § 18-17-104(e) should be read in light of *Reves*. *Id.* at 1478. In fact, § 18-17-104(2) does not contain the *Reves* ambiguity. See *infra* note 923. Accordingly, it should not be read as limited by *Reves*. Judge Kane consistently declines to read the text of the Colorado statute, even when the Colorado Supreme Court properly corrects him. See *infra* 922. Nevertheless, plaintiffs successfully moved for leave to file an amended complaint, which was upheld against a variety of objections, including *Reves*, in *Brooks v. Bank of Boulder*, 911 F. Supp. 470, 477 (D. Colo. 1996).

908. 55 F.3d 1525 (11th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3640 (1996).

909. The six defendants belonged to the South Florida chapter of the Outlaws, a national club referred to as a "one-percenter." In gang parlance, "one-percenter" means that a club consists of the one percent of the overall biker population that "raises the most hell." Only white males are allowed to be members of the Outlaws; any member who attempts to leave the gang is threatened with harm to him and his family. *Id.* at 1533. While women are not allowed to join the Outlaws, they can become affiliated with the club as "old ladies." Some "old ladies" are designated as property of the club as a whole, while others belong to individual members. Each "old lady" is

trial, the government proved that defendant Nolan established the South Florida Chapter of the Outlaws around 1969 and, during his tenure as Outlaws president, expanded the Outlaws' activities from prostitution to drug trafficking. The jury also found that Nolan and his five co-defendants committed a variety of predicate acts, including murder, extortion, kidnapping and prostitution. Nolan and three of his co-defendants were convicted under §§ 1962(c) and 1962(d); the other two defendants were convicted only under § 1962(d).<sup>910</sup>

On appeal, the Eleventh Circuit rightly rejected Nolan's contention that he did not participate in the affairs of a RICO enterprise, as required by § 1962(c). Finding that the "operation or management" test announced in *Reves* applied to criminal as well as civil RICO cases,<sup>911</sup> the court found that Nolan committed a number of predicate acts that satisfied this test. For example, he purchased an "old lady" from a fellow Outlaw and transported her across state lines for the purpose of prostitution. He also participated in numerous drug deals with Outlaws and retained one of the gang members as a bodyguard. The court emphasized, "Nolan continued to associate in fact with the South Florida Outlaws and . . . his association included some part in directing the affairs of that enterprise."<sup>912</sup> The Eleventh Circuit then also appropriately affirmed Nolan's § 1962(d) conviction, following *Quintanilla: Reves*; "does not apply to a conviction for RICO conspiracy."<sup>913</sup> Rather, the evidence need only give rise to a reasonable inference that Nolan manifested an agreement to participate in the enterprise through a pattern of racketeering activity.<sup>914</sup> The court found ample evidence of agreement, since Nolan was a leader of the Outlaws, had aggressively recruited members, and personally had committed 34 predicate acts related to the gang.<sup>915</sup>

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required to work (usually as a prostitute or nude dancer) and give her money to her Outlaw man. She must do whatever any Outlaw tells her to do with no questions asked, and she may not take drugs without the permission of an Outlaw. Combined with the small amount of money that old ladies are allowed to keep, these rules insure the total dependency on the Outlaws of the "old ladies". *Id.* at 1533-34.

910. *Id.* at 1534-36.

911. *Id.* at 1542. (citing *Napoli v. United States*, 45 F.3d 680, 683 (2nd Cir.), *cert. denied*, 115 S. Ct. 1796 (1995) and *United States v. Oreto*, 37 F.3d 739, 750 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 1160 (1995)).

912. *Id.* at 1546. The Eleventh Circuit also stated that "[a]lthough the Supreme Court has yet to delineate the exact boundaries of the operation or management test, we are confident that Nolan fits within those boundaries." *Id.*

913. *Id.* at 1547 (citing *Napoli*, 45 F.2d at 683-84 and *Quintanilla*, 2 F.2d at 1484). *Accord*, *United States v. Castro*, 89 F.3d 1443, 1452 (11th Cir. 1996).

914. *Id.* at 1543.

915. *Id.* at 1547-48. *Wiselman v. Oppenheimer & Co. Inc.*, 835 F.Supp. 1398 (M.D.Fla. 1993), in which plaintiffs purchased shares in a limited partnership that was designed to acquire and operate Wendy's fast food restaurants. Oppenheimer was the financial advisor to the partnership; he was also responsible for the financing and location of the franchises. Shortly after the shares of the partnership were sold, the partnership filed for bankruptcy protection. The plaintiffs accused the defendants of misrepresenting the partnerships' financial prospects in violation of RICO and state claims of fraud and misrepresentation. On a motion for summary judgment, the district court noted several problems with the plaintiff's RICO claim. First, the plaintiffs did not identify the RICO "enterprise." In their original pleading, they claimed that Wendy's "including its directors, officers, employees, and franchisees" was the RICO enterprise. *Id.* at 1402. Later, the plaintiffs stated, "Wendy's

### M. The District of Columbia Circuit

The Court of Appeals for the District of Columbia Circuit has yet to face a post-*Reves* decision. A district court was, however, one of the first to apply the *Reves* "operation or management" test. In *Jones v. Meridian Towers Apts.*,<sup>916</sup> plaintiffs were tenants in a building that defendants planned to convert into condominiums to avoid the District of Columbia rent control laws. Plaintiffs alleged that defendants "induced the tenant-plaintiffs to agree to the conversion by promising them the chance to purchase their units and by entering into purchase agreements with plaintiffs on which defendant[s] never intended to close."<sup>917</sup> At issue in *Jones* was whether two of the attorneys who represented the corporate RICO enterprise reached the necessary level of participation in it to be liable under § 1962(c). These defendants, Harvey and Hagner, allegedly purchased condominiums in the building, rented them for a profit charged prior to the conversion, but then did not record the deeds. Harvey also wrote a letter to some of the plaintiffs proposing to buy their purchase rights without informing them that their units were already sold.<sup>918</sup> The district court first decided that these actions were not sufficient to meet the *Reves* standard.<sup>919</sup> The court found, "the fact that Harvey may have written one or two letters and therefore could be found by a jury to have committed at least one act of racketeering does not change the court's conclusion."<sup>920</sup> Citing the District of Columbia Circuit's decision in *Yellow Bus*, the *Jones* court held that the commission of predicate acts violates § 1962(c) "only when those acts were the vehicle through which a defendant 'conduct[ed] or participat[ed] . . . in the conduct of [the] enterprise's affairs,'" <sup>921</sup> The RICO substantive counts were

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is not the enterprise at issue here." *Id.* Based on these contradictory statements, the court granted the motion for summary judgment: "[i]f after two years of discovery and eight volumes in a case file, Plaintiffs cannot produce sufficient evidence. . . of . . . an essential element of their legal claim. . . the Court is somewhat dubious if this can be achieved at trial." *Id.* Second, the court found that Oppenheimer's actions did not meet the *Reves* test under § 1962(c). The court examined a number of post-*Reves* decisions and concluded "*Reves*. . . strongly intimates that the entities most amenable to RICO liability are those existing within an enterprise, not outside entities serving an enterprise, i.e., in a professional capacity." *Id.* at 1403. The court was, therefore, unwilling to recognize that "the rendition of professional services" equated to operation or management. While the court acknowledged that Oppenheimer received substantial sums for its services and performed various tasks, including arranging financing and selling interests, it found that it did not participate in the "operation or management." Plaintiff neither plead nor argued aiding and abetting nor § 1962(d); the Court did not, therefore, consider possible alternative theories of liability. *See also* *In re Cascade International Securities Litigation*, 840 F. Supp. 1558 (S.D.Fla. 1993) (law firm not liable under civil RICO for reckless disregard of facts about financial condition of corporation).

916. 816 F. Supp. 762 (D.D.C. 1993).

917. *Id.* at 764.

918. *Id.* at 771.

919. The district court noted that the *Reves* court "disagreed with the suggestion of the Court of Appeals for the District of Columbia Circuit that § 1962(c) requires 'significant control over or within an enterprise.'" *Id.* at 772 (quoting *Reves*, 507 U.S. at 179 n.4 (quoting *Yellow Bus Lines v. Drivers, Chauffeurs & Helpers Local Union* 639, 913 F.2d 948, 954 (D.C. Cir. 1990), *cert. denied*, 501 U.S. 1222 (1991)).

920. 816 F. Supp. at 771.

921. *Id.* at 771 (citing *Yellow Bus*, 913 F.2d at 954-55). The District of Columbia Circuit Court of Appeal

therefore dismissed. The court then considered, however, the impact of *Reves* on conspiratorial liability under § 1962(d). The court properly held that nothing in *Reves* required that claims under § 1962(d) allege the operation or management of the enterprise by all of the alleged co-conspirators. Following general conspiracy jurisprudence, the court found, "to hold that under § 1962(d) a plaintiff must show that an alleged coconspirator was capable of violating the substantive offenses under § 1962(c), that is, that he participated to the extent required by *Reves*, 'would add an element to RICO conspiracy that Congress did not direct.' "<sup>922</sup>

## N. The States

### 1. The Statutes

Following the enactment of RICO by Congress in 1970, thirty states, Puerto Rico, and the Virgin Islands passed legislation modeled on the federal RICO statute.<sup>923</sup> *Reves* poses a question of interpretation, however, for only a handful of

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recently cited *Reves* to support a plain language reading of statutes. In *Qi-Zhuo v. Meissner*, 70 F.3d 136 (D.C. Cir. 1995), a Chinese national sought review of the denial of his application for permanent residency in the United States. At issue was the meaning of the Chinese Student Protection Act "CSPA," 8 U.S.C. § 1255. The plaintiff wanted the court to read the statute broadly and to find an exemption that Congress failed to include. The court, however, cited *Reves*, "where the plain language of the statute is clear, the court generally will not inquire further into its meaning." *Id.* at 140. (quoting *Reves*). The court added that inconclusive or inconsistent legislative history cannot overcome such plain language.

922. *Id.* at 773 (quoting *United States v. Pryba*, 900 F.2d 748, 760 (4th Cir.), *cert. denied*, 498 U.S. 924 (1990) (discussing the effect of requiring a showing that a defendant agreed personally to commit two predicate acts.)).

923. ARIZ. REV. STAT. ANN. § 13-2301-2317 (1989 & Supp. 1994, 1995); California Control of Profits of Organized Crime Act, CAL. PENAL CODE §§ 186-186.8 (West 1989 & Supp. 1995); Colorado Organized Crime Control Act, COLO. REV. STAT. ANN. §§ 18-17-101 to -109 (West 1990 & Supp. 1994, 1995); Corrupt Organizations and Racketeering Act, CONN. GEN. STAT. ANN. §§ 53-393 to -403 (West 1994); The Delaware Racketeer Influenced and Corrupt Organizations Act, DEL. CODE ANN. tit. 11, § 1501-1511 (1987 & Supp. 1994); Florida Racketeer Influenced and Corrupt Organizations Act, FLA. STAT. ANN. § 895.01 to .09 (West 1994 & Supp. 1995); the Florida Civil Remedies For Criminal Practices Act, FLA. STAT. ANN. §§ 772.101 to 190 (West 1994 & Supp. 1995); Georgia RICO (Racketeer Influenced and Corrupt Organizations) Act, GA. CODE ANN. §§ 16-14-1 to -15 (1992 & Supp. 1995); HAW. REV. STAT. §§ 842-1 to -12 (1994); Racketeering Act, IDAHO CODE, §§ 18-7801 to 7805 (1987 & Supp. 1995); Narcotics Profit Forfeiture Act, 725 ILCS 175/1-9 (1994); Racketeer Influenced and Corrupt Organizations, IND. CODE ANN. § 35-45-6-1 to -2 (West 1986 & Supp. 1995); 34-4-30.5-1 to .5-7 (West 1983 & Supp. 1995); Louisiana Racketeering Act, LA. REV. STAT. ANN. § 15:1351 to :1356 (West 1992 & Supp. 1995); MICH. COMP. LAWS ANN., §§ 159F-159X (West 1991 & Supp. 1996); MINN. STAT. §§ 609.901 to .912 (1994 & Supp. 1995); Racketeer Influenced and Corrupt Organizations Act, MISS. CODE ANN. § 97-43-1 to -11 (1994); NEV. REV. STAT. § 207.350 to .520 (1992 & Supp. 1995); N.J. STAT. ANN. § 2C:41-1 to -6.2 (West 1995); Racketeering Act, N.M. STAT. ANN. §§ 30-42-1 to -6 (Michie 1989); Organized Crime Control Act, N.Y. PENAL LAW §§ 460.00 to .80 (McKinney 1989); North Carolina Racketeer Influenced and Corrupt Organizations Act, N.C. GEN. STAT. §§ 75 D-1 to -14 (1994 & Supp. 1994); N.D. CENT. CODE §§ 12.1-06.1-01 to .1-08 (1985 & Supp. 1995); OHIO REV. CODE ANN. §§ 2923.31 to .36 (Anderson 1993 & Supp. 1994); Oklahoma Corrupt Organizations Prevention Act, OKLA. STAT. ANN. tit. 22, §§ 1401 to 1419 (West 1995); OR. REV. STAT. § 166.715 to .735 (1990); 18 PA. CONS. STAT. ANN. § 911 (1983 & Supp. 1995); Racketeer Influenced and Corrupt Organizations, R.I. GEN. LAWS §§ 7-15-1 to -11 (1992); Racketeer Influenced and Corrupt Organizations Act of 1989, TENN. CODE ANN. §§ 39-12-201 to -210 (1991 & Supp. 1994); Pattern of Unlawful Activity Act, UTAH CODE ANN. §§ 76-10-1601 to -1609 (1995); Criminal Profiteering Act, WASH. REV. CODE ANN. §§ 9A.82.001 to -.904 (West 1988 & Supp. 1995); Wisconsin Organized Crime Control Act, WIS. STAT. ANN. §§ 946.80 to .88 (West Supp. 1994); Act

these state statutes, because the key statutory language is different in the state statutes. The use of "conduct" both as a verb, meaning "to manage," and as a noun, meaning "behavior," which created the ambiguity in federal RICO faced by

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Against Organized Crime, P.R. LAWS ANN. tit. 25, §§ 971 to 971s (1980 & Supp. 1991); Criminally Influenced and Corrupt Organizations Act, V.I. CODE ANN. tit. 14, §§ 600-614 (Supp. 1995). *See generally*, U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, LOCAL PROSECUTION OF ORGANIZED CRIME: THE USE OF STATE RICO STATUTES (OCT. 1993). The New York Statute is perceptively analyzed in Hon. Martin Marcos, *Enterprise Corruption*, Chapter VI, NEW YORK CRIMINAL LAW 863 (19 Richard A. Greenberg ed.).

Hawaii (1972) and Pennsylvania (1973) largely copied the federal statute, as did New Jersey (1981). Florida (1977) modeled its legislation on RICO, but its statutory language is substantially its own work-product. In fact, a majority of states after 1977 modeled their legislation on the Florida text rather than federal RICO. The Florida model does not contain the *Reves* ambiguity. FLA. STAT. ANN. § 895.03 (West 1994 & Supp. 1995) ("It is unlawful for any person employed by, or associated with, any enterprise *to conduct* or participate direct or indirectly *in such enterprise* through a pattern of racketeering activity or the collection of an unlawful debt.") (emphasis added). The phrase "to conduct" should be read in its usual sense of "behavior." Even if it is read to mean "to manage," a second use of "conduct" is not present in the statutory text, as in *Reves*. Thus, because "or participate" modifies "such enterprise," "to participate" is an alternative way in which the statute can be violated *independent* of "to conduct". "Participate" means "to take part in." BLACK'S LAW DICTIONARY 1275 (4th ed. 1957); *see also id.* at 1274 ("*participis criminis*," which is Latin for "participant in crime; an accomplice."); *Russello v. United States*, 464 U.S. 16, 21 (1981) ("term . . . of breath"). Accordingly, both "managers" and "participants" would fall within the class who could violate the statute. It would not be necessary, as in *Reves*, to be either a "manager" or a "participant in the management." Only Arizona, California, New York, and North Carolina may be characterized as independent drafts. Arizona, however, subsequently revised its 1978 statute to bring it into closer conformity with the federal model; the revision is partially based on Blakey and Perry, *supra* note 3, at 1049-53. Traditionally, when a legislature borrows legislation from another jurisdiction, precedent in existence at the time of its enactment is considered part of the legislation. *See, e.g.*, *Capital Traction Co. v. Hof*, 171 U.S. 1, 36 (1879) ("must be deemed"); *Metropolitan R. Co. v. Moore*, 121 U.S. 558, 572 (1887) ("presumed"). Decisions after that date are thought to be only persuasive. *See, e.g.*, *Stutsman County v. Wallace*, 142 U.S. 293, 312 (1882) ("persuasive"); *Cathcard v. Robinson*, 30 U.S. (5 Pet.) 263, 279 (1831) (before, not after). The presumption, however, "varies in strength with the similarity of the language, the established character of the decisions . . . and the presence or lack of other indicia of intention." *Carolene Products Co. v. United States*, 323 U.S. 18, 26 (1944). On the other hand, where the statutory scheme adopted is different, a different meaning is thought to be intended. *Shannon v. United States*, 114 S. Ct. 2419, 2424-26 (1994). Unfortunately, district court decisions often thoughtlessly assume that state RICO statutes—without regard to differences in text, policy, or legislative history—should simply be read like RICO. *See, e.g.*, *Behunin v. Dow Chem Co.* 650 F. Supp. 1387, 1390 (D. Colo. 1986) (despite difference in text, Colorado's RICO "pattern" coincides with Federal RICO). District Judge John L. Kane, the author of *Behunin*, is a self-confessed hostile critic of RICO. *See In Re Dow Co. Sarabond Products Liability Litigation*, 666 F. Supp. 1466, 1471 (D. Colo. 1987) ("RICO is just, in my view, a rather sloppily thought out kind of way to get the Mafia that everybody jumps on so they can have more fun with fraud."). Fortunately, the state courts themselves are more sensitive to the nuances of differences in text and legislative history. *See, e.g.*, *People v. Chaussee*, 880 P.2d 749, 753-59 (Colo. 1994) (specifically rejecting *Behunin* as a decision reached "without discussion and without noting difference in language"; Colorado RICO's pattern requirement of "relationship" not limited by the federal concept of "continuity" and citing text, liberal construction clause, legislative history, the law of sister states, commentators, testimony of G. Robert Blakey of March 20, 1981 before Colorado House Judiciary Committee, and G. Robert Blakey and Greg A. Walker, *Emerging Issues Under Colorado Organized Crime Control Act—Colorado Little RICO*, 18 Colo. Lawyer 2077, 2080 (1989)). Judge Kane did not learn from *Chaussee*. *See supra* note 906. Obviously, the presence of different state policy concerns should also lead to different constructions. *See, e.g.*, *Corbin v. Pickrell*, 136 Ariz. 589, 667 P.2d 1304 (1983) (federalism not implicated in Arizona RICO).

State courts, on the other hand, generally follow federal jurisprudence on "enterprise." *See, e.g.*, *Stroik v. State*, 671 A.2d 1335, 1341 (Del. 1996) (RICO; automotive subleasing business an "enterprise" because it had organizational continuity, established framework for making and executing decisions, and existence separate

from the pattern of racketeering activity)(citing *Turkette*, 452 U.S. at 583 ("enterprise" is ongoing, various associates function as unit, and is separate from "pattern"); *State v. Ball*, 661 A.2d 251, 261 (N.J. 1995) (RICO; an "enterprise" must have organization, but need not feature a particular structure or configuration; an "enterprise" must be plead and proved separately from the "pattern of racketeering activity" element)(citing *Turkette*, but distinguishing majority and minority federal opinions.), *cert. denied*, 116 S.Ct. 779 (1996); *State v. Huynh*, 519 N.W.2d 191, 196 (Minn. 1994) (RICO; "enterprise" is characterized by common purpose, ongoing organization, decision making structure, and activities of organization that extend beyond commission of criminal acts into a pattern of racketeering activity) (relying on *United States v. Kragness*, 830 F.2d 842 (8th Cir. 1987) and *United States v. Bledsoe* 674 F.2d 647 (8th Cir. 1982)); *State v. Gleason*, 1996 WL 339781 at 4 (Or. App.) (RICO; auction yard where defendant sold horses he stole constitutes an "enterprise", even though yard was not engaged in the theft scheme)(citing *Turkette*, ("enterprise" encompasses both legitimate and illegitimate entities)); *State v. Jackson*, 1996 Fla. App. LEXIS 7821 at \*3 (RICO; defendant's law firm and seven other corporations were sufficiently separate from defendants to constitute an "enterprise" for RICO purposes)(relying on *McCullough v. Suter*, 757 F.2d 142 (7th Cir. 1985)(a sole proprietorship is an "enterprise"; distinct from defendant if it has employees or associates)); *Brown v. State*, 652 So.2d 877, 879 (Fla. Dist. Ct. App. 1995) (RICO; defendant who merely directed five persons to cash stolen checks was not an "enterprise", since the organization was not ongoing, defendant did not associate with five persons except for the check cashing transactions and no organization existed separate of the defendant)(relying on *Turkette* and *Bledsoe* (enterprise requires common purpose, an ascertainable structure, and functions as a continuing unit)); *State v. Reimsnyder*, 1994 WL 735517 at \*12 (Ohio App. 6 Dist.) (RICO; sole proprietorship an "enterprise", where the defendant's drug trafficking activities are conducted with business associates)(citing *McCullough*, (sole proprietorship an "enterprise" where owner has others working for it); *Reaugh v. Inner Harbour Hospital, Ltd.* 447 S.E.2d 617, 621 (Ga. App. 1994) (RICO; hospital, by benefitting from racketeering activity, was both a "person" and "enterprise" for RICO purposes)(citing *Schreiber Distrib. Co v. Serv-Well Furniture Co.*, 806 F.2d 1392 (9th Cir. 1986)(corporation can be both "person" and "enterprise" if it is beneficiary of racketeering activity)); *State v. Clark*, 645 So.2d 575, 576 (Fla. Dist. Ct. App. 1994) (RICO; scam in which defendant recruited women to help him steal identification cards to withdraw money from victim's bank accounts did constituted an "enterprise")(citing *United States v. Young*, 906 F.2d 615, 619 (11th Cir 1990)(an enterprise can exist in the absence of a formally structured group)).

Often, state courts, too, follow federal jurisprudence on "pattern of racketeering activity." *See, e.g.*, *People v. Scarantinos*, 640 N.Y.S.2d 726, 727 (N.Y. Sup. Ct. 1996) (defendant accused of falsely reporting theft of automobiles for profit and other charges; court dismisses Enterprise Corruption charge)(citing *United States v. Walgren*, 885 F.2d 1417 (9th Cir. 1989)(one act that encompasses two criminal offenses is not sufficient to meet "pattern" requirement)); *Simms-Malone v. State*, 676 A.2d 907 (Del. 1996) (RICO; secretary at a car subleasing company engaged in a "pattern of racketeering activity" by charging customers inflated application fees.) (citing *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989)("pattern of racketeering activity" exists if predicate acts are related and pose a threat of continued criminal activity)); *Ball*, 141 N.J. at 169, 661 A.2d at 251 (RICO; primary criterion for "pattern" is "relatedness"; "pattern" should be judged on a totality of the circumstances standard that may include "continuity") (relying on *Banks v. Wolk*, 918 F.2d 418 (3rd Cir. 1990), used totality standard to determine "pattern"); *Evers v. Hagen*, 1996 WL 105812 at \*2 (Wis. App.) (RICO; failure to show injury as a result of racketeering activities would fail to support a civil RICO claim)(citing *Milwaukee v. Universal Mortgage*, 692 F.Supp. 992 (E.D. Wis. 1988)); *Raines v. State*, 467 S.E.2d 217, 219 (Ga. Ct. App. 1996) (RICO; sale of timber was not two predicate acts for RICO purposes; prosecution cannot circumvent the two act requirement by charging the sale of timber and filing the deed as separate acts); *Brown v. Freedman*, 1996 WL 350794 at \*4 (Ga. App.) (RICO; to recover for a civil RICO violation, plaintiff must show injury as a result of racketeering activity; evidence of theft by conversion, theft by deception, and mail fraud are predicate offenses that meet the two predicate act requirement to establish a "pattern"); *Management Computer Services v. Hawkins*, 539 N.W.2d 111, 127 (Wis. Ct. App. 1995) (RICO; repeated use of stolen software could not be characterized as subsequent thefts establishing "pattern")(citing *Management Computer Services v. Hawkins*, 539 N.W.2d 111, 127 (Wis. Ct. App. 1995)); *Brown*, 652 So.2d at 880 (RICO; defendant who directed five persons to cash stolen checks did not engage in a "pattern", since scheme was limited in scope and did not pose a threat of long term activity)(citing *H.J. Inc.*, (pattern" is established if related predicate acts pose a threat of long term racketeering activity)).



the Supreme Court in *Reves*, is present in only ten of the state statutes.<sup>924</sup> Of those ten states, seven<sup>925</sup> are states in which the RICO provisions were added to a state criminal code in compliance with the Model Penal Code, which was codified after its promulgation in 1962. The Model Penal Code contains its own "principles of

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924. DEL. CODE ANN. tit. 11 § 1503(a) (1987 & Supp. 1994); HAW. REV. STAT. § 842-2(3) (1994); IDAHO CODE § 18-7804(c) (1987 & Supp. 1995); 725 ILCS 175/4(d) (1994); N.J. STAT. ANN. § 2C: 41-2(c) (West 1982 & Supp. 1995); N.M. STAT. ANN. § 30-42-4(c) (Michie 1989); N.D. CENT. CODE § 12.1-06.1-03(2) (1985 & Supp. 1995); 18 PA. CONS. STAT. ANN. § 911(b)(3) (1983 & Supp. 1995); R.I. GEN. LAWS § 7-15-2(c) (1992); UTAH CODE ANN. § 76-10-1603(3)(1995).

925. DEL. CODE ANN. tit. 11 (1987 & Supp. 1994); HAW. REV. STAT. § 842-2(3) (1994); N.J. STAT. ANN. tit. 2C (West 1982 & Supp. 1995); N.M. STAT. ANN. § 30-42-4(c) (Michie 1989); N.D. CENT. CODE §§ 12.1-01-01 to 12.1-33-04 (1985 & Supp. 1995); 18 PA. CONS. STAT. ANN. § 911 (1983 & Supp. 1995); UTAH CODE ANN. §§ 76-1-101 to 76-10-2101 (1995).

725 ILCS 175/4(d) (1994) was added, not to the criminal code, but as a separate chapter. Illinois enjoins "liberal construction for its general legislation." 725 ILCS 175/8 (1994). The general construction provision applies to the criminal code. *Hankins v. People*, 106 Ill. 628, 632-33 (1883). Illinois also legislatively abandoned strict construction for its criminal code in 720 ILCS 5/1-2 (1992 & Supp. 1995) ("shall be construed in accordance with a general purpose"). Decisions, however, still quote the strict construction rule now referred to as a "policy of lenity." *People v. Donaldson*, 435 N.E. 2d 477, 479 (Ill. 1982). Illinois adopted corporate criminal liability early in the Twentieth Century. *See, e.g., People v. Salene County Coal Co.*, 206 Ill. App. 266, 268 (1917). Illinois adopted the high managerial agent rule in 1961. 720 ILCS 5/5-4 (1994) (applies to offenses defined outside of criminal code) Accordingly, its courts should resolve the *Reves* ambiguity by holding that "conduct" means "behavior." Illinois also provides for general aiding and abetting liability. 720 ILCS 5/5-2 (1994).

Idaho enjoins "liberal construction" for its general legislation in IDAHO CODE § 73-102(1) (1989 & Supp. 1995). Nevertheless, its courts are reluctant to use "liberal construction" to enlarge penal statutes. *Boise Ass'n of Credit Men v. Seawell*, 276 P. 318, 319 (Idaho 1929). While Idaho did not legislatively adopt the high managerial agent rule, it follows it judicially. *State v. Adjustment Dept Credit Bureau, Inc.*, 483 P.2d 687, 691 (Idaho 1971). Accordingly, while its courts follow federal precedent under its RICO statute, *see, e.g., State v. Hansen*, 877 P.2d 898, 901-03 (Idaho 1994) (*Turkette*, 452 U.S. 675, followed on definition of "enterprise"), its courts should resolve its *Reves* ambiguity by holding that conduct means "behavior." Idaho also provides for general aiding and abetting liability. IDAHO CODE § 18-204 (1987 & Supp. 1995).

Rhode Island retains common law crimes. R.I. GEN. LAWS § 11-1-1 (1994 & Supp. 1995). Rhode Island follows the "strict construction" rule. *State v. Porto* 591 A.2d 791, 793 (R.I. 1991) (RICO prosecution; strict construction of predicate offense). Rhode Island RICO is, however, to be "liberally construed." R.I. GEN. LAWS § 7-15-10 (1994 & Supp. 1995). Rhode Island's criminal code contains no generally applicable definitions; it does not adopt the high managerial agent rule. Rhode Island follows federal precedent in construing its RICO statute. *Porto*, 591 A.2d at 795 n.3 (statute "substantively different" yet federal decision "offer sound concept and guidance in the area of conspiracy"; majority rule for RICO conspiracy (no personal act) adopted; evidence insufficient to show agreement to join enterprise). Accordingly, how its courts will resolve the *Reves* ambiguity cannot be predicted with confidence. Rhode Island also provides for general aiding and abetting liability. R.I. GEN. LAWS § 11-1-3 (1994 & Supp. 1995).

The other seven states codes contain general provisions for aiding and abetting. DEL. CODE ANN. tit. 11, § 533 (1987 & Supp. 1994); HAW. REV. STAT. § 703-222 (1994); N.J. STAT. ANN. § 2C: 2-6 (West 1995); N.M. STAT. ANN. § 30-1-13 (Michie 1994); N.D. CENT. CODE § 12.1-03-01, (1985 & Supp. 1995); 18 PA. CONS. STAT. ANN. § 306 (1983 & Supp. 1995); UTAH CODE ANN. § 76-2-202 (1995).

Seven RICO statutes contain special conspiracy provisions. DEL. CODE ANN. tit. 11 § 1503(d) (1987 & Supp. 1994); IDAHO CODE § 18-7804(d) (1987 & Supp. 1995); 725 ILCS 175/4(a) to (d) (1994); N.J. STAT. ANN. § 2C:41-2(d) (West 1982 & Supp. 1995); N.M. STAT. ANN. § 30-42-4 (D) (Michie 1989); 18 PA. CONS. STAT. ANN. § 911(b)(4) (1983 & Supp. 1995); UTAH CODE ANN. § 76-10-1603(4) (1995).

Three states' codes contain general provisions for conspiracy. HAW. REV. STAT. § 705-520 (1994); N.D. CENT. CODE § 12.1-06-04 (1985 & Supp. 1995); R.I. GEN. LAWS § 11-1-3 (1994 & Supp. 1995).

construction" provision,<sup>926</sup> express definitions of "conduct"<sup>927</sup> and "person,"<sup>928</sup> and special provisions for entity liability, which, basically, adopt the "high managerial agent" theory of corporate criminal liability.<sup>929</sup> The "borrowed"

926. MODEL PENAL CODE § 1.02 (1962) ("The provision of this Code shall be construed according to the fair impact of their terms but when the language is susceptible to differing construction it shall be interpreted to further the general purposes stated in this section and the special purposes of the particular provision involved"). This provision was included to set aside the common law rule of strict construction. ALI COMMENTARIES, *supra* note 148, at 32-33. (The ancient rule that penal law must be strictly construed. . . is not preserved. . .").

927. MODEL PENAL CODE § 1.13 (1962) ("In this Code, unless a different meaning plainly is required: . . . (5) conduct means an action or omission and its accompanying state of mind, or, where relevant, a series of acts or omissions. . .").

928. *Id.* § 1.13 (8) (" 'person,' 'he' and 'action' include any natural person, and where relevant, a corporation or an unincorporated association. . ."). This definition and similar definitions of "person" make possible entity liability, which gives rise to the managerial issue. *See infra* 932.

929. *Id.* § 2.07 (1962) provides:

(1) A corporation may be convicted of the commission of an offense if:

(a) the offense is a violation or the offense is defined by a statute other than the Code in which a legislative purpose to impose liability on corporations plainly appears and the conduct is performed by an agent of the corporation acting in behalf of the corporation within the scope of his office or employment, except that if the law defining the offense designates the agents for whose conduct the corporation is accountable or the circumstances under which it is accountable, such provisions shall apply; or

(b) the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law; or

(c) the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.

(2) When absolute liability is imposed for the commission of an offense, a legislative purpose to impose liability on a corporation shall be assumed, unless the contrary plainly appears.

(3) An unincorporated association may be convicted of the commission of an offense if:

(a) the offense is defined by a statute other than the Code which expressly provides for the liability of such an association and the conduct is performed by an agent of the association acting in behalf of the association within the scope of his office or employment, except that if the law defining the offense designates the agents for whose conduct the association is accountable or the circumstances under which it is accountable, such provisions shall apply; or

(b) the offense consists of an omission to discharge a specific duty of affirmative performance imposed on associations by law.

(4) As used in this Section:

(a) "corporation" does not include an entity organized as or by a governmental agency for the execution of a governmental program;

(b) "agent" means any director, officer, servant, employee or other person authorized to act in behalf of the corporation or association and, in the case of an unincorporated association, a member of such association;

(c) "high managerial agent" means an officer of a corporation or an unincorporated association, or, in the case of a partnership, a partner, or any other agent of a corporation or association having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association.

(5) In any prosecution of a corporation or an unincorporated association for the commission of an offense included within the terms of Subsection (1) (a) or

Subsection 3(a) of this Section, other than an offense for which absolute liability has been imposed, it shall be a defense if the defendant proves by a preponderance of evidence that the high managerial agent having supervisory responsibility over the subject matter of the offense

statutory language in those states is, therefore, principally from the Model Penal Code; it is only secondarily federal RICO language.<sup>930</sup> Of those seven states, six<sup>931</sup> contain an express construction provision, five an express definition of

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employed due diligence to prevent its commission. This paragraph shall not apply if it is plainly inconsistent with the legislative purpose in defining the particular offense.

(6) (a) A person is legally accountable for any conduct he performs or causes to be performed in the name of the corporation or an unincorporated association or in its behalf to the same extent as if it were performed in his own name or behalf.

(b) Whenever a duty to act is imposed by law upon a corporation or an unincorporated association, any agent of the corporation or association having primary responsibility for the discharge of the duty is legally accountable for a reckless omission to perform the required act to the same extent as if the duty were imposed by law directly upon himself.

(c) When a person is convicted of an offense by reason of his legal accountability for the conduct of a corporation or an unincorporated association, he is subject to the sentence authorized by law when a natural person is convicted of an offense of the grade and the degree involved.

See generally Kathleen F. Brickey, *Rethinking Corporate Liability Under The Model Penal Code*, 19 RUTGERS L.J. 593 (1988). State jurisprudence, which reflects the common law without statutory provisions modeled on the Model Penal Code, does not generally contain a "high managerial agent theory." See, e.g., *Commonwealth v. Beneficial Fin. Co.*, 275 N.E. 2d 33, 82 (Mass. 1971), *cert. denied*, 407 U.S. 914 (1972). But see *States v. Chapman Dodge Center, Inc.*, 428 So. 2d 413, 420 (La. 1983) (manager of car dealership illicit conduct in failing to pay over tax not attributed to corporation). *Chapman* is best distinguished because of its civil law background. Federal law, on the other hand, never contained the limitation. Brickey, *supra*, at 612 ("a corporation . . . [may] be held to account for criminal acts performed by officers and agents in the course of their employment, without regard to their status in the corporation hierarchy.") (citing *United States v. Illinois Cert R.R.*, 303 U.S. 239 (1938) (person who unloaded cattle) and *New York Cert & Hudson River R.R. v. United States*, 212 U.S. 481 (1909) (assistant traffic manager)). Even in the states that adopt some form of a limitation like that of the Model Penal Code, "state legislatures seem to have picked and chosen at random from 2.07's grab bag of rules." Brickey, *supra*, at 631.

930. Typically, state courts pay due attention, but with varying results, to the Model Penal Code when they interpret their criminal codes. See, e.g., *Zimmerman v. Delaware*, 628 A.2d 62, 68 (Del. 1993) (recognizing as relevant an argument based on Model Penal Code restriction of claim of right defense to extortion, but finding it not persuasive in light of plain language of statute); *Morrissey v. Delaware*, 620 A.2d 207, 210-22 (Del. 1993) (state code follows Model Penal Code and common law and embodies innocent agent theory of aiding and abetting); *State v. Gaylord*, 890 P.2d 1167, 1179-80 n.22 (Haw. 1995) (Model Penal Code used "as the guide" by legislature; used "to inform" interpretation; misuse of entrusted funds theft); *In re Doe*, 869 P.2d 1304, 1313 (Haw. 1994) (Model Penal Code used as "guide"; insufficient evidence of "fighting words" used against police office); *Illinois v. Capitol News Inc.*, 560 N.E.2d 303, 306-07 (Ill. 1990) (Model Penal Code used to interpret and uphold against vagueness challenge of state obscenity exemption for "scientific or other special justification"), *cert. denied*, 498 U.S. 1120 (1991); *New Jersey v. Galloway*, 628 A.2d 735, 739 (N.J. 1993) (Model Penal Code used to interpret diminished capacity defense); *New Mexico v. Gardner*, 814 P.2d 458, 459 (N.M. Ct. App.) (Model Penal Code used to interpret making false report offense; differences in language noted; narrow construction adopted), *cert. denied*, 814 P.2d 103 (1991); *New Mexico v. Cotton*, 790 P.2d 1050 (N.M. Ct. App.) (Model Penal Code used to interpret solicitation offense; language similar to Colorado statute; differences in language noted; narrow construction adopted), *cert. denied*, 790 P.2d 1032 (N.M. 1990); *North Dakota v. Ensz*, 503 N.W. 2d 236, 238-39 (N.D. 1993) (Model Penal Code provision used to interpret theft valuation provision); *North Dakota v. VanNatta*, 506 N.W.2d 63, 65 (N.D. 1993) (Model Penal Code used to interpret competency to stand trial provisions); *Pennsylvania v. Campbell*, 651 A.2d 1096 (Pa. 1994) (Model Penal Code used to interpret accomplice provision) (citing *Pennsylvania v. Brown*, 375 A.2d 331, 333 (1977)); *State v. Vigil*, 842 P.2d 843, 846 (Utah 1992) (Model Penal Code used to interpret attempt provision).

931. DEL. CODE ANN. tit. 11, § 203 (1987) ("The general rule that a penal statute is to be strictly construed does not apply to this Criminal Code, but the provisions herein must be construed according to the fair import of their terms to promote justice and effect the purposes of the law. . ."); HAW. REV. STAT. § 701-104 (1994) ("The

"conduct,"<sup>932</sup> and "person,"<sup>933</sup> and six<sup>934</sup> reflect the "high managerial

provisions of this Code cannot be extended by analogy so as to create crimes not provided for herein; however, in order to promote justice and effect the objects of the law, all of its provisions shall be given a genuine construction, according to the fair import of the words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision."); N.J. STAT. ANN. § 2C:1-2(c) (West 1995) ("The provisions of the code shall be construed according to the fair import of their terms but when the language is susceptible of differing constructions it shall be interpreted to further the general purposes stated in this section and the special purposes of the particular provision involved."); N.D. CENT. CODE § 12.1-01-02 (1985) ("The general purposes of this title are to establish a system of prohibitions, penalties, and correctional measures to deal with conduct that unjustifiably and inexcusably causes or threatens harm to those individual or public interests for which governmental protection is appropriate. To this end, the provisions of this article are intended, and shall be construed, to achieve the following objectives . . ."); 18 PA. CONS. STAT. ANN. § 105 (1983) ("The provisions of this title shall be construed according to the fair import of their terms but when the language is susceptible of differing constructions it shall be interpreted to further the general purposes stated in this title and the special purposes of the particular provision involved."); UTAH CODE ANN. § 76-1-104 (1995) ("The provisions of this code shall be construed in accordance with these general purposes[:] (1) Forbid and prevent the commission of offenses. (2) Define adequately the conduct and mental state which constitute each offense and safeguard conduct that is without fault from condemnation as criminal. (3) Prescribe penalties which are appropriate to the seriousness of offenses and which permit recognition or [sic] differences in rehabilitation possibilities among individual offenders. (4) Prevent arbitrary or oppressive treatment of persons accused or convicted of offenses.").

Of these seven states, three state RICO statutes contain a special liberal construction provision. 725 ILCS 175/8 (1994); N.J. STAT. ANN. § 2C:41-6 (West 1995); R.I. GEN. LAWS § 7-15-10 (1992).

932. HAW. REV. STAT. § 701-118 (1994) (" 'Conduct' means an act or omission, or, where relevant, a series of acts or a series of omissions, or a series of acts and omissions."); N.J. REV. STAT. § 2C:1-14 (West 1995) (" 'Conduct' means an action or omission and its accompanying state of mind, or, where relevant, a series of acts and omissions . . ."); N.D. CENT. CODE §§ 12.1-02-01 (1985) ("A person commits an offense only if he engages in conduct, including an act, an omission, or possession, in violation of a statute which provides that the conduct is an offense."), 12.1-01-04 (Supp. 1995) (" 'Act' or 'action' means a bodily movement, whether voluntary or involuntary."); 18 PA. CONS. STAT. ANN. § 103 (1983) (" 'Conduct.' An action or omission and its accompanying state of mind, or, where, relevant, a series of acts and omissions."); UTAH CODE ANN. § 76-1-601(4) (Supp. 1995) (" 'Conduct' means an act or omission.").

933. DEL. CODE ANN. tit. 11, § 222(19) (1987) (" 'Person' means a human being who has been born and is alive, and, where appropriate, a public or private corporation, an unincorporated association, a partnership, a government or a governmental instrumentality."); HAW. REV. STAT. § 701-118(7) (1994) (" 'Person,' 'he,' 'him,' 'actor,' and 'defendant' include any natural person and, where relevant, a corporation or an unincorporated association."); N.J. REV. STAT. § 2C:1-14(g) (West 1995) (" 'Person,' 'he,' and 'actor' include any natural person and, where relevant, a corporation or an unincorporated association."); N.D. CENT. CODE § 12.1-01-04(24) (Supp. 1995) ("As used in this title and in sections outside this title which define offenses, 'person' includes, where relevant, a corporation, limited liability company, partnership, unincorporated association, or other legal entity. When used to designate a party whose property may be the subject of action constituting an offense, the word 'person' includes a government which may lawfully own property in this state."); UTAH CODE ANN. § 76-1-601(8) (Supp. 1995) (" 'Person' means an individual, public or private corporation, government, partnership, or unincorporated association.").

934. Under Delaware law:

A corporation is guilty of an offense when. . . (2) The conduct constituting the offense is engaged in, authorized, solicited, requested, commanded, or recklessly tolerated by the board of directors or by a high managerial agent acting within the scope of his employment and in behalf of the corporation.

DEL. CODE ANN. tit. 11, § 281 (1987).

Under Hawaii law:

A corporation or unincorporated association is guilty of an offense when. . . (2) The conduct or result specified in the definition of the offense is engaged in, caused, authorized, solicited, requested, commanded, or recklessly tolerated by the board of directors of the corporation or by the executive board of the unincorporated association or by a high managerial agent acting within

rule.”<sup>935</sup> Where strict construction is statutorily abandoned, the courts should feel free to resolve the ambiguity in light of policy and not automatically in favor of the more narrow construction. Where an express definition of “conduct” is present, it

the scope of his office or employment and in behalf of the corporation or the unincorporated association.

HAW. REV. STAT. § 702-227 (1994).

Under New Jersey law:

A corporation may be convicted of the commission of an offense if. . . (3) The conduct constituting the offense is engaged in, authorized, solicited, requested, commanded, or recklessly tolerated by the board of directors or by a high managerial agent acting within the scope of his employment and in behalf of the corporation.” “High managerial agent [is defined as] an officer of a corporation or any other agent of a corporation having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation.

N.J. REV. STAT. § 2C:2-7 (West 1995).

Under North Dakota law:

A corporation or a limited liability company may be convicted of:

a. Any offense committed by an agent of the corporation or limited liability company within the scope of the agent’s employment on the basis of conduct authorized, requested, or commanded, by any of the following or a combination of them:

- (1) The board of directors or the board of governors.
- (2) An executive officer, executive manager, or any other agent in a position of comparable authority with respect to the formulation of corporate policy or the supervision in a managerial capacity of subordinate employees.
- (3) Any person, whether or not an officer of the corporation, who controls the corporation or is responsibly involved in forming its policy.
- (4) Any person, whether or not a manager of the limited liability company, who controls the limited liability company or is responsibly involved in forming its policy.

N.D. CENT. CODE § 12.1-03-02(1)(a) (Supp. 1995).

Under Pennsylvania law:

A corporation may be convicted of the commission of an offense if . . . (3) the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.

18 PA. CONS. STAT. ANN. § 307(a) (1983).

Under Utah law:

A corporation or association is guilty of an offense when . . . (2) The conduct constituting the offense is authorized, solicited, requested, commanded, or undertaken, performed, or recklessly tolerated by the board of directors or by a high managerial agent acting within the scope of his employment and in behalf of the corporation or association.

UTAH CODE ANN. § 76-2-204 (1995).

935. That a legislature intends to use “conduct” or “to conduct” in the general sense of “behavior” is aptly demonstrated when it adopts a high managerial agent rule for entity liability; if it knows how expressly to adopt a management rule for entity liability, it also knows how to adopt it for individual liability. *Reves*, too, did not state a generally applicable definition of “conduct” for federal criminal or other jurisprudence. Conduct as a “noun” (“conduct”), not as a verb (“to conduct”) carries no general inference of direction or leadership legally or in common speech. *See, e.g., Sanabria v. United States*, 437 U.S. 54, 70 n.26 (1978) (18 U.S.C. § 1955: “conduct” “proscribes any degree of participation in an illegal gambling business”); *United States v. Skinner*, 946 F.2d 176, 178 (2d Cir. 1991) (18 U.S.C. § 1956: broad construction of “conduct . . . financial transaction”); *United States v. Zannino*, 895 F.2d 1, 10 (1st Cir.) (same), *cert. denied*, 492 U.S. 1082 (1990); UNITED STATES SENTENCING

should control over the *Reves* interpretation. Even where an express definition of "conduct" is not present, the Model Penal Code definition should be followed on "borrowing" principles. Where the state code already reflects a high managerial agent concept for entity liability, little sense would be made by reading a similar concept into "conduct" under RICO. How each of these state statutes will be read by state supreme courts in light of *Reves* is, of course, yet to be determined. Only the New Jersey answer is known for sure.

## 2. *The Decisions*

In *State v. Ball*,<sup>936</sup> the New Jersey Supreme Court handed down a thoughtful opinion interpreting the New Jersey Racketeer Influenced and Corrupt Organizations Act.<sup>937</sup> Growing out of a successful prosecution for the operation of illegal dump sites in New Jersey through a variety of offenses, including bribery, the court's opinion includes a comprehensive review of the text of the New Jersey statute, its legislative history, and decisions under federal law and decisions of sister states. The decision discusses a wide range of issues in RICO jurisprudence, not the least of which is the possible applications to the state statute of *Reves*.<sup>938</sup>

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GUIDELINES MANUAL § 1B1.3 ("relevant conduct" means "acts or omissions"). Compare BLACK'S LAW DICTIONARY 367 (6th ed. 1990) ("[p]ersonal behavior; deportment; mode of action; any positive or negative act."), with THE COMPACT EDITION OF OXFORD ENGLISH DICTIONARY 508 (1971) ("The notion of direction or leadership is often obscured or lost; e.g., an investigation is conducted by all those who take part in it"), and WEBSTER'S NEW DICTIONARY OF SYNONYMS 174 (1971) ("often the idea of leadership is lost or obscured and the stress is placed on or carried by all or many of the participants."). The 1983 North Dakota RICO statute illustrates the point well. N.D. CENT. CODE § 12.1-06.1-02(1)(a) (1985 & Supp. 1995) is a leading organized crime provision, one part of which applies to "organizing, managing, directing, supervising, or financing a criminal syndicate." It also provides that "[n]o person shall be convicted [of leading organized crime] on the basis of accountability as an accomplice unless that person aids or participates in violating this section in one of the ways specified." *Id.* at 12.1-06.1-02(2). Nevertheless, its control or conducting an enterprise provisions reflect the *Reves* ambiguity. *Id.* § 12.1-06.1-03(2) ("A person is guilty of an offense if the person is employed or associated with any enterprise and conducts or participates in the conduct of that enterprise's affairs through a pattern of racketeering activity") (emphasis added). Obviously, the legislature knew how to restrict aiding and abetting liability to "manage" in the leading organized crime provisions. Construing "conduct" to mean "manage" in the controlling or conducting provisions would make little or no sense.

936. 661 A.2d 251 (N.J. 1995), *cert. denied*, 116 S. Ct. 779 (1996).

937. N.J. STAT. ANN. § 2C:41-1 to -6.2 (West 1995) ("N.J. RICO").

938. Along the way, the court recognized that New Jersey RICO was patterned after federal law, so that it was appropriate to "heed federal legislative history and case law," but that the legislature sought "purposes and goals" distinct "from those of the federal statutory scheme." *Ball*, 661 A.2d at 258. Nevertheless, it concluded that New Jersey RICO was not limited to the infiltration of legitimate business by organized crime or "to such traditional organized crime interests as the Mafia." *Id.* Only Pennsylvania limits its RICO statute to "organized crime." Compare *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 (1985) ("any person"—not just mobsters"), and *Banderas v. Banco Central del Ecuador*, 461 So. 2d 265, 269 (Fla. Dist. Ct. App. 1985) (Fla. RICO not limited to "organized crime"), with *Pennsylvania v. Bobitski*, 632 A.2d 1294, 1296 (Pa. 1993) (white collar crime not related to organized crime or racketeering not within Pa. RICO), and *Pennsylvania v. Dennis* 618 A.2d 972, 975 (Pa. Super. Ct. 1992) (federal decisions instructive, but not controlling), *appeal denied*, 634 A.2d 218 (1993).

State RICO jurisprudence also contains applications of a variety of state procedural and other issues that touch on RICO. See, e.g., *Gordon v. Eighth Judicial District*, 913 P.2d 240, 249 (Nev. 1996) (RICO: "enterprise" must

After a careful analysis of the text of the statute and federal and state jurisprudence,<sup>939</sup> the court crafted its own definition of "enterprise."<sup>940</sup> No "distinct ascertainable structure" requirement was imposed on its "enterprise" definition,<sup>941</sup> but "enterprise" was held to be an element separate and apart from "pattern of racketeering."<sup>942</sup> The court found that even though the two were separate, the same evidence could be used to establish both elements.<sup>943</sup> It then proceeded to analyze "pattern of racketeering." After another careful analysis of

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be plead with sufficient clarity; pleading must include the essential facts embodying offenses and name enterprises)(citing NRS 173.075); *Cummings v. Charter Hospital of Las Vegas*, 896 P.2d 1137, 1141 (Nev. 1996) (RICO; RICO complaint must be pled with particularity in terms of the nature of the conduct and when and where it occurred); *Kilminster v. Day Management Corporation*, 1996 WL 405245 at \*10 (Or.) (RICO; RICO cannot be used as a backdoor to assert a workman's compensation claim that is barred by statute); *Roe v. Franklin Co., Ohio*, 1996 WL 112663 at \*5 (Ohio App. 10 Dist.) (RICO; one of the predicate offenses in a RICO complaint must be a felony; coercion a misdemeanor, does not count toward two act requirement); *Oluykoya v. American Association of Cab Companies*, 465 S.E.2d 715, 717 (Ga. Ct. App. 1995) (RICO; illegal sale of insurance is not a RICO violation in and of itself; it may qualify if coupled by mail or wire fraud); *Maddox v. Southern Engineering Company*, 453 S.E.2d 70, 72 (Ga. Ct. App. 1994) (RICO; complaint against defendants that alleged conspiracy to provide the government with false information about a construction project was sufficient, despite plaintiff's inability to show he was misled by information and what specifically the false statements were); *Cobb*, 460 S.E.2d at 521 (RICO; corporation could be found liable under RICO for racketeering activity conducted by employees of the corporation who were acting within the scope of their employment; corporation could also be liable for acts committed prior to incorporation if the corporation reaped the benefits of the racketeering activity); *Reaugh*, 447 S.E.2d at 619 (RICO; patient's racketeering claim against operator of treatment program was subject to five year RICO statute of limitations, rather than a two year statute of limitation that applies to personal injuries); *Darragh v. Superior Court*, 900 P.2d 1215, 1220 (Ariz. Ct. App. 1995) (RICO; independent evidence that a city appraiser was involved in scheme to defraud by undervaluing plaintiff's property is necessary to sustain a RICO action, where testimony surrounding appraiser's services is immunized by judicial witness immunity); *Marcus v. Miller*, 663 So.2d 1340, 1343 (Fla. Dist. Ct. App. 1995) (RICO; co-defendant received award of attorney fees where claimant fails to support a RICO action for civil theft).

939. The court reviewed the conflicting federal decisions on "ascertainable structure". See generally APPENDIX G (ASSOCIATION IN FACT). It then commented that three state courts rejected the "ascertainable structure" rule. See *Ball*, 661 A.2d at 260 (citing *Martin v. Georgia*, 376 S.E.2d 888, 892-93 (Ga. Ct. App. 1988); *New Mexico v. Hughes*, 767 P.2d 382, 387-88 (N.M. Ct. App. 1988), cert. denied, 767 P.2d 354 (1989); and *Oregon v. Cheek*, 786 P.2d 1305, 1307-08 (Or. App. 1990)). Florida followed it by decision. See *Boyd v. Florida*, 578 So. 2d 718, 721-22 (Fla. Dist. Ct. App.), reh'g denied, 581 So. 2d 1310 (Fla. 1991). Uniquely, New York followed it by statutory text. N.Y. PENAL LAW § 460.10(3) (McKinney 1989). Minnesota reflected its own special rule. *Minnesota v. Huynh*, 519 N.W.2d 191, 196 (Minn. 1994) (organization set up that does more than commit predicate acts). Idaho and Pennsylvania followed *Turkette*. *Idaho v. Hansen*, 877 P.2d 898, 901-03 (Idaho 1994); *Pennsylvania v. Donahue*, 630 A.2d 1238, 1245-46 (Pa. Super. Ct. 1993), appeal denied, 645 A.2d 1316 (Pa. 1994).

Other states also develop their own jurisprudence on "enterprise" related issues. See, e.g., *Commonwealth v. Besch*, 674 A.2d 655, 660 (Pa. 1996) (RICO; "enterprise" does not include wholly illegitimate organizations); *Cobb County v. Jones Group P.L.C.*, 218 Ga. App. 149, 153, 460 S.E.2d 516, 521 (1995) (RICO; proof of enterprise not always required; may show that accused, through "a pattern of racketeering activity" or proceeds from it, gained control of any type of real or personal property).

940. The Court relied on New Jersey's liberal construction directive, New Jersey RICO § 2C:41-6; it also relied on the broader list of illustrative enterprises in the state definition. *Ball*, 661 A.2d at 260-61.

941. *Ball*, 661 A.2d at 260-61.

942. *Id.* ("The enterprise is the association, and the pattern of racketeering activity consist of the predicate incidents").

943. *Id.*

the text of the New Jersey statute and federal<sup>944</sup> and state jurispru-

944. The court reviewed federal jurisprudence from *Sedima S.P.R.L. v. Imrex Co.*, 741 F.2d 482 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985), to *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989). Writing for a sharply divided court of appeals, Judge Oakes suggested in *Sedima* that civil RICO suits against "respected and legitimate 'enterprises'" were "extraordinary, if not outrageous." *Sedima*, 741 F.2d at 487. E.F. Hutton was included among the cited "legitimate" enterprises. *But see* *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 395 n.14 (7th Cir. 1984) ("[T]he white-collar crime alleged in some RICO complaints against 'legitimate' businesses is in some ways at least as disturbing . . ."), *aff'd*, 473 U.S. 606 (1985); Chris Welles, *Why The E.F. Hutton Scandal May Be Far From Over*, BUS. WK., Feb. 24, 1986, at 98, col. 1 (Hutton pleads guilty to \$2,000 counts of mail and wire fraud in multi-million dollar bank scam). The court then imposed on civil RICO a crippling criminal conviction and racketeering injury limitation. The Supreme Court reversed, but observed that "the failure of Congress and the courts to develop a meaningful concept of 'pattern'" resulted in "[t]he extraordinary uses to which civil RICO [had] been put . . ." *Sedima*, 473 U.S. at 500. The courts of appeals and the district courts then "promptly produced the widest and most persistent circuit split on an issue of federal law in recent memory." *H.J. Inc.*, 492 U.S. at 251 (Scalia, J. concurring).

In *H.J. Inc.* the Supreme Court unanimously reversed the Eighth Circuit's multischeme test for "pattern." The court recognized that the "pattern" concept played a key role in each of RICO's substantive provisions, §§ 1962(a), (b), and (c), both criminally and civilly. 492 U.S. at 236-39. Beginning with the ordinary meaning of the word, the court paraphrased it as an "arrangement or order of things or activity." *Id.* at 238 (quoting 11 OXFORD ENGLISH DICTIONARY 357 (2d ed. 1989)). Turning to the legislative history of the statute, the court determined that Congress used "pattern" with a "fairly flexible concept of a pattern in mind." *Id.* at 239. The court concluded that the "arrangement or order" should reflect "continuity [or its threat] plus relationship." *Id.* The court then recognized that continuity, a "temporal concept," meant a "substantial period of time," more than a "few weeks or months." *Id.* at 242. A finding of a threat of continuity also was dependent "on the specific facts of each case." *Id.* The development of the concept would have to await, the court concluded, on "future cases, absent a decision by Congress to revisit RICO to provide clearer guidance." *Id.* at 243. In brief, the court developed a fairly precise six-step process that can be used for determining if a "pattern" is present within the meaning of federal RICO. Two goals must be realized: relationship and continuity (or a threat of continuity). To see if these two goals are met up to six questions must be asked and answered: (1) Is the series of acts (at least two) related to one another, for example, are they part of a single scheme? (2) If not, are they related to an external organizing principle, for example, to the affairs of the enterprise? If both questions are answered in the negative, relationship is not present; one prong of the two-prong is not met, and it is not necessary to proceed further. If either question is answered in the affirmative, up to three additional questions must be asked: (3) Is the series of acts open-ended, that is, do the acts possess no obvious termination point? (4) If not, did the closed-ended series of acts go on for a substantial period of time, that is, more than a few weeks or months? If either question is answered in the affirmative, continuity is present. If both questions are answered in the negative, up to two additional questions must be asked: (5) May a threat of continuity be inferred from the character of the illegal enterprise? (6) If not, may a threat of continuity be inferred because the acts represent the regular way of doing business or a lawful enterprise? If either question is answered in the affirmative, a threat of continuity is present. *See generally* *H.J. Inc.*, 492 U.S. at 237-43 (explaining concepts of relatedness and continuity). In his concurring opinion, Justice Antonin Scalia—joined by Chief Justice William Rehnquist, and Justices Sandra Day O'Connor and Anthony Kennedy—expressed considerable dissatisfaction with the majority's decision on the meaning of "pattern." *Id.* at 251 (Scalia, J., concurring). Justice Scalia's concurring opinion is filled with sarcastic remarks, which are extremely out of character for usual Supreme Court discourse. The explanation in the legislative history relied upon by the majority that "pattern" requires a showing of "continuity plus relationship" was, he suggested, as helpful as the phrase "life is a fountain." *Id.* at 252. "Relationship" defined in terms of 18 U.S.C. § 3575(e) was "utterly uninformative." *Id.* He added that the phrase "closed period of repeated conduct" communicates "no idea [of] what [it] means." *Id.* at 253. The Court's discussion was, in short, "vague," *id.*, and "murky." *Id.* at 254. What "pattern" requires beyond "two acts" was, for him, simply "beyond" understanding. *Id.* *But see* *Jones v. SEC*, 298 U.S. 1, 33 (1936) (Cardozo, J. dissenting) (stating that "[h]istorians may find hyperbole in the sanguinary simile"); *Supremely Surly*, N.Y. TIMES, July 9, 1989, § 4, at 26, col. 1. A New York Times editorial stated that "[w]hat's [not] acceptable [in Supreme Court opinions] is the raucous tone and unruly language . . . [T]he cases are hard enough, and maintaining public respect for the Court difficult enough, without the added



dence,<sup>945</sup> the court imposed its own more relaxed standard for “con-

burden of inflammatory, surly argumentation.” *Id.* The speculation that Justice Scalia originally was assigned to write *H.J. Inc.*, took too long to do it, and lost the five votes necessary to produce a majority opinion to Justice William Brennan may account for his intertemperate language. See Linda Greenhouse, *Broad Use of RICO is Upheld*, N.Y. TIMES, June 27, 1989, at D1, col. 6, D23, col. 3 (“[T]he case appeared to have been unusually troublesome . . . . There was some evidence that Justice Scalia had initially been assigned to write the opinion but was either unable to finish the job or was unable to hold four Justices to his view”). More difficult to understand is his not too veiled suggestion that “pattern” is unconstitutionally vague. *H.J. Inc.*, 492 U.S. at 256 (Scalia, J. concurring) (stating that it “bodes ill for the day when [it is] challenge[d]”).

Contrary to Justice Scalia’s forecast, the courts of appeal are little troubled by RICO’s vagueness. Indeed, if RICO’s predicate offenses are definite, so, too, is RICO. *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 57-58 (1989) (rejecting facial attack under first amendment against Indiana RICO) (“if the latter is not unconstitutionally vague, the former cannot be vague either”); S. Rep. No. 91-617 at 158 (1969) (“no due process constitutional barrier . . . [because] my proscribed act is the pattern must violate an independent statute.”); Blakey & Gettings, *supra* note 2 at 1031-33 (“RICO . . . [does] not draw a line between criminal and innocent conduct . . . [but] authorize[s] the imposition of different criminal or civil remedies on conduct already criminal when performed in a specific fashion”); G. Robert Blakey, *Is “Pattern” Void For Vagueness?*, CIV. RICO REP., Dec. 12, 1989, at 6 (concluding “no” after reviewing precedent). What is not explained is how, as a matter of principled jurisprudence, Chief Justice William Rehnquist and Justices Sandra Day O’Connor and Anthony Kennedy could, along with Justice Antonin Scalia, join in the *Fort Wayne* majority and Justice Scalia’s *H.J. Inc.*, concurrence. Apart from ire at losing his opinion to Justice William Brennan, Justice Scalia appears to forget that a major source of the difficulty with “pattern” under RICO may not be with semantics, but politics. See LAWRENCE FRIEDMAN, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* at 33 (1975). Professor Friedman aptly notes that “uncertainty exists not because but in spite of the text. What unsettles . . . rules is social controversy—challenge, social demand.” *Id.* Apparently, RICO is not hard to read, but hard to accept. Vagueness challenges to RICO statutes have been rejected when they have been raised since *H.J. Inc.* See, e.g., *United States v. Dischner*, 974 F.2d 1502, 1508 (9th Cir. 1992), *cert. denied*, 507 U.S. 923 (1993). This confirms that the lack of clarity in RICO does not necessarily mean that a vagueness challenge will succeed. See also *United States v. Van Dorn*, 925 F.2d 1331, 1334 n.2 (11th Cir. 1991); *United States v. Glecier*, 923 F.2d 496, 497 n.1 (7th Cir.), *cert. denied*, 502 U.S. 810 (1991); *United States v. Coiro*, 922 F.2d 1008, 1017 (2d Cir.), *cert. denied*, 501 U.S. 1217 (1991); *United States v. Woods*, 915 F.2d 853, 862-64 (3d Cir. 1990), *cert. denied*, 499 U.S. 947 (1991); *United States v. Angiulo*, 897 F.2d 1169, 1178-80 (1st Cir.), *cert. denied*, 498 U.S. 845 (1990). Potential uncertainty in marginal fact situations does not render RICO vague with respect to the challenging defendant’s particular conduct. *Dischner*, 974 F.2d at 1510. Indeed, the vagueness challenge to RICO’s pattern concept is not to the statute, but to the Supreme Court’s gloss on it in *H.J. Inc.* “[N]o precedent supports the proposition that a party may attack a Supreme Court decision as void for vagueness.” *Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1103 (6th Cir. 1995) (“pattern” under RICO not vague as applied), *cert. denied*, 116 S.Ct. 1103 (1996). In fact, post-*H.J. Inc.* litigation establishes that “pattern” is an appropriate limiting factor in the use of RICO in ordinary commercial litigation. Circuit court opinions indicate that district courts regularly grant dismissals for a failure to show a “pattern,” and they are regularly affirmed on appeal. See, e.g., *Pyramid Sec., Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1116-20 (D.C. Cir.), *cert. denied*, 502 U.S. 822 (1991); *Arzuaga-Collazo v. Oriental Fed. Sav. Bank*, 913 F.2d 5, 6-7 (1st Cir. 1990); *Banks v. Wolk*, 918 F.2d 418, 421-23 (3d Cir. 1990); *American Eagle Credit Corp. v. Gaskins*, 920 F.2d 352, 354-55 (6th Cir. 1990); *United States Textiles, Inc. v. Anheuser-Busch Cos.*, 911 F.2d 1261, 1266-69 (7th Cir. 1990); *Lane v. Peterson*, 899 F.2d 737, 744-45 (8th Cir.), *cert. denied*, 498 U.S. 823 (1990); *Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183, 190-93 (5th Cir. 1990); *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1273-74 (10th Cir. 1989); *Menasco, Inc. v. Wasserman*, 886 F.2d 681, 684 (4th Cir. 1989). The jurisprudence on “pattern,” therefore, is firming up, and the use of RICO in such litigation should not continue. See generally APPENDIX C (IMPLEMENTATION).

945. The court noted that textual differences were present in the state statutes, both among themselves and compared to federal RICO. *Ball*, 661 A.2d at 263. Like the federal act, the New Jersey statute defined “pattern,” for example, as “requiring” not as “means.” See N.J. STAT. ANN. § 2C:41-1d(1) (West 1995); 18 U.S.C. § 1961(5) (1994). The Fla. Stat. Ann. § 895.2(4), too, provided “means.” Nevertheless, Florida and Indiana, despite differences in statutory texts, followed federal law. See *Florida v. Lucas*, 600 So.2d 1093, 1094-96 (Fla. 1992);

tinuity".<sup>946</sup>

Next, the court turned to the issues of "conduct" and "conspiracy." The court duly recognized *Reves* and the federal jurisprudence that preceded it, but the court was not persuaded. First, it saw "no reason why the Legislature would not seek to proscribe [the conduct of those who do not manage or supervise racketeering activity] as well as that of their bosses."<sup>947</sup> It then relied on the presence in the New Jersey Code of leadership of organized crime provisions.<sup>948</sup> "Because the Legislature has shown that it can craft a criminal statute to reach only those performing supervisory functions, we are confident that if it intended in RICO to cover only managers or supervisors, it would have done so expressly."<sup>949</sup> Finally, the court relied on the liberal construction provision in the New Jersey RICO statute.<sup>950</sup> Concluding the substantive portion of its opinion, the court ended with an analysis of RICO conspiracy.<sup>951</sup> Here, it followed the leading federal decisions,

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*Kollar v. State*, 556 N.E.2d 936, 940-41 (Ind. Ct. App. 1990). Colorado, Georgia, and Oregon, even though their statutes were modeled on Florida, *see supra* note 922, because of differences in statutory text and related factors, require "relationship," but reject "continuity." *See Colorado v. Chaussee*, 880 P.2d 749, 753-59 (Colo. 1994); *Larson v. Smith*, 391 S.E.2d 686, 688 (Ga. Ct. App. 1990); *Computer Concepts Inc. Profit Sharing Plan v. Brandt*, 801 P.2d 800, 807-09 (Or. 1990). Like *Chaussee*, *Computer Concepts Inc. Profit Sharing Plan v. Brandt* illustrates the independent judgment of state courts and their sensitivity to differences in text and legislative history. 780 P.2d 249, 255 (Or. Ct. App. ), *aff'd*, 801 P.2d 800 (1989). In *Computer Concepts*, the Court of Appeals of Oregon recognized that federal decisions were "useful," but that the Oregon Legislature "deliberately and significantly departed from" the federal model. It then rejected the effort to impose a criminal conviction limitation on Oregon RICO. *Id.* (relying on legislative history, including the testimony of State Attorney General Frohnmayer and Professor G. Robert Blakey). The Court also followed *Sedima. Id.* Nevertheless, when it turned to the meaning of "pattern," it declined to follow *H.J. Inc. Id.* at 256 (relying on the use of "means" rather than "requires"; "[w]e cannot ignore the plain meaning of unambiguous words in a statute"). The Supreme Court of Oregon affirmed the court of appeals, using essentially the same line of reasoning. 801 P.2d at 807-09 (adding that federal decisions predating the enactment of the statutes use the "continuity" concept to mean: "predicate acts over an extended period or a threat of future racketeering activity").

946. *Ball*, 661 A.2d at 251-53 (not requiring "any strong or distinctive sense of the term"; use of "incident" rather than "act" indicate need for "ongoing" or so threatening conduct; not necessary that activity be only "long-term", merely not "disconnected or isolated"). *See also, Sevech v. Ingles Markets*, 1996 WL 330325 at \*2 (Ga. App.), which the Georgia Court of Appeals applied its own putter definition holding that evidence that a defendant's behavior constitutes a "pattern" was insufficient without evidence that its was directed toward gaining or controlling something of pecuniary value).

947. *Ball*, 661 A.2d at 267.

948. *Id.* (citing N.J. STAT. ANN. § 2C:5-2g (West 1995)).

949. 661 A.2d at 267.

950. *Id.* (citing N.J. STAT. ANN. § 2C:41-6 (1995)). The court, however, recognized the presence of a state of mind requirement:

[W]e hold that to conduct or participate in the affairs of an enterprise means to act *purposefully and knowingly* in the affairs of the enterprise in the sense of engaging in activities that seek to further, assist or help effectuate the goals of the enterprise.

661 P.2d at 268 (emphasis added).

951. 661 P.2d at 268.

In addition to conspiracy, the states often look to federal decisions on other general issues. *See, e.g., Rolin Manufacturing v. Mosbrucker*, 544 N.W.2d 132, 138 (N.D. 1996) (RICO; statute requires same state of mind for criminal prosecution and civil litigation) (citing *Babst v. Morgan Keegan & Co.*, 687 F.Supp 255, 258 (E.D.La. 1988)); *State v. Mueller*, 549 N.W.2d 455, 465 (Wis. Ct. App. 1996) (RICO; the state of mind for RICO is the

including *United States v. Neapolitan*,<sup>952</sup> *United States v. Deicidue*,<sup>953</sup> and *United States v. Elliot*,<sup>954</sup> but rejected the two personal act rule followed in the First<sup>955</sup> and Second<sup>956</sup> Circuits, holding that the "fairest implication of [the silence in the legislative history on the meaning of the RICO conspiracy provisions was] that the Legislature intended that general conspiracy law apply to prosecution for conspiracy to violate RICO."<sup>957</sup> The court also noted with disapproval the federal rule that required the personal commission of two predicate acts. Requiring two personal acts "could immunize a mob boss who neither agreed to commit personally nor actually participated in the commission of the predicate acts. . . . [T]he legislature intended to confer no such immunity."<sup>958</sup> The people of the various states will be well-served if the other state supreme courts are as thorough, craftsmanslike, and thoughtful when they face an interpretation of their RICO statutes, in particular the *Reves* ambiguity.<sup>959</sup>

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same as the underlying predicate offenses; no need for separate state of mind for RICO element.) (citing *United States v. Baker*, 63 F.3d 1478, 1493 (9th Cir. 1995), *cert. denied* sub nom., *Hale v. United States*, 116 S.Ct. 921 (1996)); *State v. Allen*, 646 N.E.2d 965, 968 (Ind. Ct. App. 1995) (RICO; prosecution did not violate state double jeopardy, even though defendant prosecuted in federal court for the same conduct.) (citing *Garrett v. United States*, 471 U.S. 773 (1985)(prosecution for continuing criminal enterprise, using a prior conviction as a predicate act did not violate double jeopardy)); *State v. Leyva*, 909 P.2d 506, 512 (Ariz. Ct. App. 1995) (RICO; *in personam* civil judgment violates double jeopardy where it constitutes a second punishment.) (citing *United States v. Halper*, 490 U.S. 435 (1993)(defendant may not be subjected to additional civil sanction if the purpose is deterrence or retribution)); *Dee v. Sweet*, 218 Ga. App. 18, 21, 460 S.E.2d 110, 113 (1995) (RICO; allocation of attorney fees to specific claims in a RICO case will not be required unless the unsuccessful claims are "distinctly different claims for relief. . . .based on different facts and legal theories") (quoting *Hensley v. Eckerhart*, 461 U.S. 424 (1983)); *Interchange State Bank v. Veglia*, 286 N.J. Super 164, 177, 668 A.2d 465, 472 (1995) (RICO; standing requires a direct relationship between plaintiff's injury and defendant's conduct) (citing *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992) (defendant's RICO violation must be not only "but for", but also proximate cause of plaintiff's injury)).

952. 791 F.2d 489, 494-500 (agreement to participate in affair of (1) an enterprise (2) through a pattern of racketeering) (7th Cir.), *cert. denied*, 479 U.S. 939 and *cert. denied*, 479 U.S. 940 (1986).

953. 603 F.2d 535, 556 (5th Cir. 1979)(minimal knowledge of enterprise), *cert. denied*, 445 U.S. 946 and *cert. denied*, 446 U.S. 912 (1980).

954. 571 F.2d 880, 902 (5th Cir.)(diversified conspiracy), *cert. denied*, 439 U.S. 953 (1978).

955. *United States v. Winter*, 663 F.2d 1120, 1139 (1st Cir. 1981), *cert. denied*, 460 U.S. 1011 (1983).

956. *United States v. Ruggiero*, 726 F.2d 913, 921 (2nd Cir.), *cert. denied*, 469 U.S. 831 (1984).

957. *Ball*, 661 A.2d at 269 (citing the express incorporation of the general conspiracy provisions in N.J. STAT. ANN. § 2C:41-2d (West 1995)).

958. *Id.* at 270.

959. In *LaVornia v. Rivers*, 669 So.2d 288 (Fla. App. 5 Dist. 1996), the court of appeals in Florida faced a *Reves* issue. In *LaVornia*, the court addressed the question of whether a low-level manager, who worked for a auto loan company, was subject to federal and state RICO liability for making usurious loans. Defendant Rivers moved for summary judgment, claiming "she was only an employee of B.N. Enterprises with check writing authority." *Id.* at 289. In addition, she contended that she only ran the operation as she was instructed by her superiors and that she did not have a hand in management decisions. The court, terming her argument a "Nuremberg defense" did not find it compelling. *Id.* *Reves* held, the court observed, that RICO liability extends to those lower level personnel who follow the directives of upper management. In essence, the court avoided the issue of whether Rivers could be held liable as only a employee by finding that she participated in the "operation" of B.N. Enterprises by receiving, depositing, and disbursing proceeds from usurious loans under directions of managers.

Florida's RICO statute does not, however, contain the *Reves* "conduct" ambiguity. FLA. STAT. ANN.

## VII. CONCLUSION

The main controversies over RICO are not centered on its criminal provisions—or on its application in civil cases, where violence, provision of illicit

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§ 895.03(3). Nevertheless, the court did not allude in the text of the act. Rivers was liable as a person who “operated” the enterprise under Florida law. The court did not resolve whether she would have been liable under an alternative “aiding and abetting” theory had she not been a person who “operated the enterprise; nor was any clue given as to how the state statute might apply differently from the federal statute.

See also *Firststar Bank of Minnesota, N.A. v. Nellis*, 1994 WL 534901 at \*2-3 (Minn. Ct. App.) (debtors RICO counterclaim in bank collection action dismissal affirmed; frivolous claim; sanctions awarded; conduct of affairs of joint entity by Firststar not shown; predicate acts fail to meet “pattern” (citing *Reves*)).

Because state courts possess concurrent jurisdiction over federal civil RICO suits, parties may opt to bring them in a federal or a state court. See, e.g., *Tafflin v. Levitt*, 493 U.S. 455, 467 (1990) (RICO; holders of unpaid CD’s sue failed savings and loan; “there is nothing in the language of RICO—much less an ‘explicit statutory directive’—to suggest that Congress has, by affirmative enactment, divested the state courts of jurisdiction to hear civil RICO claims”). Consequently, state courts are developing their own federal RICO jurisprudence. See, e.g., *Podraza v. Carriero*, 630 N.Y.S.2d 163, 166, 212 A.2d 331, 335 (1995) (RICO; investors in a real estate development venture sue management corporation and officers for misusing funds and defrauding plaintiffs; court reinstates RICO claim because plaintiffs raised issue of material fact as to discovery of racketeering injury) (citing *Bivens Gardens Office v. Barnett Bank*, 906 F.2d 1546 (11th Cir. 1990), cert. denied, 500 U.S. 910 (1991) (action accrues when plaintiff knows of injury and injury is part of a “pattern”)); *Gervase v. Superior Court*, 37 Cal. Rptr. 875, 881 (Cal. Ct. App. 1995) (RICO; Prudential Securities customers sue over fraud concerning investments in limited partnerships; court reverses demurrer on federal RICO claim because sufficient facts alleged for “enterprise”) (citing *United States v. Cauble*, 706 F.2d 1322 (5th Cir. 1983) (partnership may be enterprise) and *Bloch v. Prudential-Bache Securities*, 707 F.Supp. 189 (W.D.Pa. 1989) (a limited partnership may be an “enterprise”)); *Kuhns v. Koessler*, 880 P.2d 1293, 1295 (Mont. 1994) (RICO; suit for collection of promissory notes from failed partnership results in counterclaim for fraud and breach of fiduciary duty; reverses summary judgment as to RICO claim, since stockholder status not a prerequisite for RICO standing) (citing *Sedima*, 473 U.S. at 496-97 for standing requirements). When a federal RICO civil suit is filed in a state court, only Supreme Court decisions and higher state court decisions are mandatory authority. See, e.g., *Gervase*, 37 Cal. Rptr. at 881-82 (“The decisions of the United States Supreme Court are binding and the decisions of the lower federal courts are entitled to great weight, but where federal precedents are in conflict or simply lacking then we must make an independent determination of federal law.”). Most state courts, however, do not indicate that cited federal decisions are only persuasive. See, e.g., *Kinzer v. Landon*, 1996 WL 354880 at \*11-13 (Tex. Ct. App. 1996) (RICO; allegedly unnecessary operation that leaves a “metallic artifact” in the patient leads to a RICO suit; summary judgment affirmed, since one treatment by doctor not enough to be a RICO “person” or to create a “pattern”) (citing *Delta Truck & Tractor v. J.I. Case Co.*, 855 F.2d 241 (5th Cir. 1988) (person engaged in single lawful project of limited scope is not a RICO “person”)); *Chabot v. City of Waterbury*, 1996 WL 168085, \*11-12 (Conn. Super. Ct. 1996) (RICO; city employee sues for wrongful termination; city counterclaims alleging misappropriation of city funds; court affirms verdict against city, since city failed to prove sufficient predicate acts at trial) (citing *Martin-Trigona v. Smith*, 712 F.2d 1421 (D.C.Cir. 1983) (establishes necessary elements for a RICO claim)); *Elliott v. First Security Bank*, 544 N.W.2d 823, 831-32 (Neb. 1996) (RICO; debtors filed suit against bank for wrongful execution against their real property; bank counterclaims, alleging mail fraud, filing of false affidavits, and sale of real property with the intention to avoid execution; court reverses summary judgment, since issues of material fact existed as to the commission of predicate acts) (citing *Delta Pride Catfish v. Marine Midland Bus. Loans*, 767 F.Supp. 951 (E.D. Ark. 1991) (predicate acts must be demonstrated)); *Whitbeck v. Webb*, 1995 WL 536430, \*3-4 (Minn. Ct. App. 1995) (RICO; dispute over employment agreement and profit-sharing for employee of nightclub operation; derivative shareholder’s RICO suit not allowed, because granting leave to amend without a cognizable RICO claim present would delay proceedings and prejudice other party) (citing *United States v. Kopituk*, 690 F.2d 1289, 1323 (11th Cir. 1982), cert. denied, 461 U.S. 928 and 463 U.S. 1209 (1983) (establishes the elements of prima facie RICO claim) and *Alan Neuman Prods. v. Albright*, 862 F.2d 1388, 1392-93 (9th Cir. 1988), cert. denied, 493 U.S. 858 (1989) (complaint alleged mail or wire fraud must specify time, place and nature of communication)); *Great American Acceptance Corp. v. Zwego*, 902 S.W.2d 859,

goods and services, or corruption of unions and governmental entities is involved. Instead, those who would seek to abolish—or at least eviscerate—the statute focus almost exclusively on so-called “garden variety” fraud.<sup>960</sup> Those lawyers, courts,

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864 (Mo. Ct. App. 1995) (RICO; default judgment against defendant car dealer, alleging defendant charged loans to other dealers and bought the cars for himself; court reversed; “enterprise” not alleged) (citing *Bennett v. Berg*, 685 F.2d 1053 (8th Cir.), *cert. denied*, 464 U.S. 1008, (1982)) (“[A]n enterprise may be said to exist where . . . separateness from the acts of racketeering can be found”); *Allenson v. Hoyne Savings Bank*, 651 N.E.2d 573, 576-78 (Ill. App. Ct. 1995) (RICO; mortgagors bring action against savings and loan based on improper interest charges; dismissal of RICO claim reversed, since S&L and three subsidiaries could be “enterprise”) (citing *Haroco v. American National Bank & Trust*, 747 F.2d 384 (7th Cir. 1984), *aff’d*, 473 U.S. 606 (1985) (parent corporations and subsidiaries may be distinct as “enterprise” when “person” is either parent or subsidiary); *Firststar Bank of Minnesota, N.A. v. Nellis*, 1994 WL 534901 at 2-3 (Minn. Ct. App. 1994) (RICO; debtors counterclaim in collection action that bank and owners of printing business to sell the business and have debtors pay off the balance of the current owner’s outstanding loan; affirmed dismissal since conduct of affairs by Firststar not alleged; predicate acts fail to meet “pattern” definition) (citing *Reves v. Ernst & Young*, 570 U.S. 170 (1993) (defendant must have some hand in directing the affairs of the “enterprise”); *Metzger v. Sebek*, 892 S.W. 20, 47-48 (Tex. Ct. App. 1994) (RICO; father accused of molestation of his child sues children’s center and doctors for acquiring illegal income and fabricating stories of child abuse; court affirms directed verdict for defendants, since no injury alleged) (citing *Brandenburg v. Seidel*, 859 F.2d 1179 (4th Cir. 1988) (RICO standing requires injury to business or property caused by violation)); *City of Waterbury v. Santopietro*, 1994 WL 442527 at \*2-5 (Conn. Super. Ct.) (RICO; mayor sued for misappropriation of public funds and conspiring with other public employees to covert public funds; court rules that predicate acts not sufficiently alleged) (citing *Turkette*) (enumerated predicate acts are necessary to establish “pattern”)); *Browning Avenue Realty Corp. v. Rubin*, 615 N.Y.S. 360, 363-64 (N.Y. App. Div. 1994) (RICO; joint venturers in shopping center project sued accountants and engineers concerning the cost of completion misrepresentations; court dismissed complaint because of collateral estoppel) (citing *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 991 (8th Cir. 1989) (federal RICO fraud broader than common-law fraud; *Browning* court determines, however, that claims are still “virtually identical”)). In most decisions, state courts merely rely on all of the large body of federal RICO law. *See, e.g., Kinzer*, 1996 WL 354880 at \*11; *Chabot*, 1996 WL 168085 at \*11-12 (court also turns to *Santopietro*, a related case which relies heavily on federal law); *Elliott*, 544 N.W.2d at 831-32; *Whitbeck*, 1995 WL 536430 at \*3; *Great American Acceptance*, 902 S.W.2d at 864; *Podraza*, 630 N.Y.S.2d at 166-69; *Allenson*, 651 N.E.2d at 576-78; *Firststar Bank*, 1994 WL 534901 at 2-3; *Metzger*, 892 S.W. at 47-48; *Santopietro*, 1994 WL 442527 at 2-4; *Browning*, 615 N.Y.S. at 363-64. Some courts apparently consider only U.S. Supreme Court cases. *See, e.g., Kuhns*, 880 P.2d at 1295-96. Courts may look to several circuits for guidance or comparison. *See, e.g., Podraza*, 630 N.Y.S.2d at 166-69. While most courts discuss RICO in the context of other cases, a court may rule on a RICO claim without citing authority in support of its decision. *See, e.g., Robbins MBW Corp. v. Ashkenazy*, 644 N.Y.S.2d 260, 261-262 (N.Y. App. Div. 1996) (RICO; retail store vendor sues purchasers to collect promissory note; RICO counterclaim based on false reports of assets; affirmed summary judgment as to RICO claim, since no particularity or “pattern”).

The development of RICO jurisprudence in the state courts is also reflected in its use to analogize to other areas of law. RICO is used to discuss “pattern” in other statutory law. *See, e.g., People v. Olguin*, 37 Cal. Rptr. 2d 596, 611-12 (Cal. Ct. App. 1994) (gang member’s second-degree murder charge sentence enhanced because of anti-gang legislation, including “pattern of gang activity language;” court upholds sentence, rejecting defense argument that federal RICO “pattern” requirement of continuity should apply to California statute) (citing *H.J., Inc.*); *People v. Funes*, 28 Cal. Rptr. 2d 758, 772 (Cal. Ct. App. 1994) (similar; conviction and murder sentence affirmed because “pattern of gang activity” does not require jury unanimity in regards to predicate acts) (citing, but rejecting *United States v. Echeverri*, 854 F.2d 638, 642-43 (3d Cir. 1988)) A federal RICO conviction requires jury unanimity.

960. *See Blakey & Perry, supra*, note 3 at 881 (the “garden variety fraud myth”).

In *Furman v. Cirrito*, Judge Pratt aptly observed:

Despite the clarity of Congress’ language [in drafting RICO] defendants argue that since RICO’s primary purpose is to eradicate organized crime, it is [not] directed . . . against businessmen engaged in ‘garden variety fraud’ . . . . While RICO’s primary focus may have been organized

and lobbyists who argue against the statute act as if Congress did not *expressly* include fraud within its provisions.<sup>961</sup> Few acknowledge, in short, its legitimate application to fraud. When Congress enacted RICO in 1970, however, it expressly focused the statute on "fraud"<sup>962</sup> because it found that the traditional "sanctions and remedies" were "unnecessarily limited in scope and impact."<sup>963</sup> Congress was well aware that "existing law, state and federal, was not adequate . . ."<sup>964</sup> By 1970, both "organized" crime and "white-collar" crime—one of the most sophisticated kinds of crime—was a "serious influence on the social fabric, and on the freedom of commercial and interpersonal transactions."<sup>965</sup> The legal tools to curtail white-collar crime were, therefore, consciously strengthened by Congress when it enacted RICO. Despite argument to the contrary, Congress' attention was not solely focused on organized crime. Congress knew it was enacting a statute that went beyond organized crime. Moreover, the problem of white-collar crime—like the problem of organized crime—remains acute today. Because white-collar offenders often occupy positions of trust, their misdeeds impact beyond their immediate target, arguably, in some ways, beyond that of violence, the provision of illegal goods and services, or the corruption of unions or governmental entities by organized crime. As former FBI Director William H. Webster aptly commented in 1982: "through use of their positions of trust, cunning and guile, white-collar criminals undermine professional . . . integrity . . . and . . . are responsible for the loss of billions of dollars annually . . ."<sup>966</sup> Consumers, savers, investors, legiti-

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crime, when considering the statute Congress also recognized that fraud us a pervasive problem throughout our society . . . which causes billions of dollars in loss each year . . . Congress further acknowledged that existing state and federal law was not capable of dealing with this problem.

....

When Congress provided severe sanctions, both civil and criminal, for conducting the affairs of an 'enterprise' through a 'pattern of racketeering activity,' it provided no exception for businessmen, for white collar workers, for bankers, or for stockbrokers. If the conduct of such people can sometimes fairly be characterized as 'garden variety fraud,' we can only conclude that by the RICO statute that Congress has provided an additional means to weed that 'garden' of its fraud.

741 F.2d 524, 528-29 (2d Cir. 1984), *cert. denied*, 473 U.S. 922 (1985). The relevant legislative history is set out in APPENDIX H (EXTORTION).

961. Congress recently accepted these arguments; it amended RICO to exclude from it securities fraud civilly, but not criminally. The shameful character of story of how Congress came to act requires extended treatment. See generally APPENDIX I (SECURITIES FRAUD REFORM).

962. 84 Stat. 922 (1970).

963. *Id.* at 923.

964. *Turkette*, 452 U.S. at 586. More recently, Chief Justice William Rehnquist observed that "[w]hite collar crime is 'the most serious and all-pervasive crime problem in America today.'" *Braswell v. United States*, 487 U.S. 99, 115 n.9 (1988) (quoting John Conyers, *Corporate and White Collar Crime: A View By the Chairman of the House Subcommittee on Crime*, 17 AM. CRIM. L. REV. 287, 288 (1980)). The Chief Justice added, "[a]lthough this statement was made in 1980, there is no reason to think that the problem had diminished in the meantime." *Id.*

965. HERBERT EDELHERTZ, *THE NATURE, IMPACT, AND PROSECUTION OF WHITE COLLAR CRIME* 6-7 (1970) [hereinafter EDELHERTZ].

966. *Appropriations for Fiscal Year 1983: Hearings on the Department of State, Justice and Commerce, The*

mate business people and local, state and federal governments are the tragic victims of fraud. In just a few short years, a nationwide problem of thrift and bank failures reached epidemic proportions, and only six years ago, President George Bush told the nation that "unconscionable risk-taking, fraud and outright criminality [were] factors" that led to this multi-billion dollar crisis.<sup>967</sup> Congressional studies found that at least one-half of bank failures and one-quarter of thrift failures involved criminal activity by insiders,<sup>968</sup> and professionals played key roles in these failures, while major accounting and law firms appropriately paid millions of dollars to settle liability suits.<sup>969</sup> In short, little that is charitable can be said for a construction of RICO that would give these white-collar offenders—to say nothing of their organized crime counterparts—a safe-harbor from their just desserts.

The epidemic of fraud and white-collar crime plaguing the nation appears overwhelming, but it is not unsolvable. If RICO—federal and state—is used with other law enforcement tools, it promises to emerge, as Congress and the state legislatures intended, as an effective legal means to curtail wrongdoing in the thrift and banking industries,<sup>970</sup>

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Judiciary and Related Agencies: Before a Subcomm. of the House Comm. on Appropriations, 97th Cong., 2d Sess. 144 (1982).

Writing in 1967, the President's Crime Commission, whose studies led to RICO, commented on the issue of white collar crime:

During the last few centuries economic life has become vastly more complex. Individual families are not self-sufficient; they rely for the basic necessities of life on thousands or even millions of different people, each with a specialized function, many of whom live hundreds or thousands of miles away.

....

[W]hite collar crime [is]—[a term] not commonly used to designate those occupational crimes committed in the course of their work by persons of high status and social repute [that] . . . are only rarely dealt with through the full force of criminal sanctions.

....

Serious erosion of morals accompanies [the white collar offender's violation]. [Those who so] flout the law set an example for other business and influence individuals, particularly young people, to commit other kinds of crime on the ground that everybody is taking what he can get.

A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE. The Commission also observed:

Fraud is especially vicious when it attacks, as it so often does, the poor or those who live on the margin of poverty. Expensive nostrums for incurable diseases, home improvement frauds, frauds involving the sale or repair of cars and other criminal schemes create losses which are not only sizable in gross but are also significant and possibly devastating for individual victims.

*Id.* at 33-34.

967. *President's News Conference on Savings Crisis and Nominees*, N.Y. TIMES, Feb. 7, 1989, at D9.

968. H.R. REP. NO. 100-1088 at 2-13 (1988).

969. *See supra* note 21 *et. seq.* (discussing the causes of the S & L failures).

970. Both the RTC and FDIC use RICO. *See, e.g.,* FSLIC v. Shearson-American Express, Inc., 658 F. Supp. 1331 (D.P.R. 1987); FDIC v. Hardin, 608 F. Supp. 348 (E.D. Tenn. 1985). *See generally Prosecuting Fraud in The Thrift Industry: Hearings before the Subcomm. on Crim. Justice of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989).

the pension field,<sup>971</sup> and the insurance industry.<sup>972</sup> In the words of one commentator in 1970, "[i]f substantial progress can be made in the prevention, deterrence and successful prosecution of . . . [white-collar] crime, we may reasonably anticipate substantial benefits to the material and qualitative aspects of our national life."<sup>973</sup>

Unduly restricting RICO will substantially cripple the ability of the attorney general as well as private plaintiffs to use the statute to achieve its remedial purposes. Law enforcement cannot be solely relied upon to bear the burden of policing fraud. Over forty-five years ago, Justice Jackson rightly observed, "[T]he criminal law . . . [has] long proved futile to reach the subtle kinds of fraud at all, and able to reach grosser fraud, only rarely."<sup>974</sup> Indeed, private lawsuits, with their

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971. See, e.g., *Thornton v. Evans*, 692 F.2d 1064, 1065 (7th Cir. 1982) (pension plan fraud: "Evidence . . . traces a pattern which seems distressingly prevalent today: the savings of working men and women are pilfered, embezzled, parlayed, mismanaged and outright stolen by unscrupulous persons occupying positions of trust and confidence."). RICO is also being used successfully on behalf of pension plan beneficiaries. See, e.g., *Crawford v. LaBoucherie Bernard, Ltd.*, 815 F.2d 117 (D.C. Cir.), cert. denied, 484 U.S. 943 (1987), and cert. denied 484 U.S. 1020 (1988); J. Robert Suffoletta, *supra* note 3.

972. State insurance commissioners are using RICO to vindicate the interests of the companies that are defrauded. See, e.g., *Schacht*, 711 F.2d at 1356-58; *North Carolina ex. rel. Long v. Alexander & Alexander Servs., Inc.*, 680 F. Supp. 746, 749-51 (E.D.N.C. 1988); Hon. James E. Long & Donald M. Wright, *RICO Law, Practice and Issues in The Context of Insurer Insolvency*, 9 JOURNAL OF INS. REG. 344, 374 (1991). North Carolina Insurance Commissioner Long & Wright concludes:

An effective partnership of private victims and state regulators now exists in RICO actions within the insurance industry. One reason for this partnership is the treble damages provision of the present civil RICO. It advances the public policy of saving valuable and expensive government legal time and talents by allowing private RICO actions financed by non-governmental sources. This policy deserves as much support today as it did when both the Senate and House incorporated it as part of the RICO bill almost 20 years ago.

When a company becomes insolvent, most states guaranty payment of claims against them through guaranty funds. These funds are provided by all insurance carriers that do business in the state, but these funds are recovered by surcharging (within rates) consumers within the state or giving tax credits against premium taxes. Thus, the insolvent company is a financial burden on all a state's citizens. Any RICO damages recovered would help offset the potential cost to consumers. Thus, treble damages in the case of insolvent companies run by state regulators act as both a source for sorely needed funds and a deterrent to wrong-doers.

See generally *U.S. Government Efforts to Combat Fraud and Abuse in the Insurance Industry*, S. REP. NO. 102-262 at 17 (1992). Mentioning insurance raises the issue of medical fraud. Health care fraud may cost between \$30 and \$100 billion. U.S.G.A.O., *Health Care Fraud*, May 1996, at 2.

973. EDELHERTZ, *supra* note 964 at 11.

974. ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 152 (Vintage ed. 1941). John E. Conklin right concluded:

[T]he criminal justice system treats business offenders with leniency. Prosecution is uncommon, conviction is rare, and harsh sentences almost non-existent. At most, a businessman or corporation is fined; few individuals are imprisoned and those who are serve very short sentences. Many reasons exist for this leniency. The wealth and prestige of businessmen, their influence over the media, the trend towards more lenient punishment for all offenders, the complexity and invisibility of many business crimes, the existence of regulatory agencies and punishment of violators all help explain why the criminal justice system rarely deals harshly with businessmen. This failure to punish business offenders may encourage general social disorganization in the general population. Discriminatory justice may also provide lower class and working class individuals with justifica-



threat of treble damages may, in fact, be more effective in combatting fraud than the threat of criminal penalties.<sup>975</sup> A restrictive reading and application of RICO would, therefore, deprive many fraud victims of access to a potent weapon to be used to vindicate their injuries, as Congress expressly designed it.

Courts should reject the efforts of those who would twist the Supreme Court's carefully tailored holding in *Reves* into a safe-harbor for professionals, who cook books or paper over illicit transactions. *Reves* focuses on the substantive liability of those who are principals in the first degree; it does not preclude accomplice liability. Nor does it mandate a departure from traditional principles governing conspiracy liability. In brief, who is involved in the "operation or management" of an enterprise ought to reflect function in the structure of the enterprise. In a large, centrally-located corporation, only higher level executives will be directly involved in its "management." In corporations with many physically separate branches, such as a department store chain or a securities broker dealer, each branch will necessarily have someone who is involved in operating or managing the corporation or its branch operations. Every partner in a partnership—unless their agreement states otherwise—is involved in the management or operation of the partnership. Showing that partners are involved in managing or operating the entity will not be nearly as difficult as showing that an outside professional or consulting firm is actually managing a corporation through corruption or violence. Associations-in-fact—whether licit or illicit—should be the least affected by the *Reves* decision. The concept of joint venture that ought to govern in this area appropriately reflects the basic principle that all parties in joint ventures possess a voice in the direction of the enterprise. Most licit joint ventures will be governed by written agreements and the equality or other arrangement of the members in operating or managing the enterprise should be easily established. Illicit enterprises will pose problems of proof that may or may not be easily overcome. The illegal character of the conduct charged will, however, easily rope most culpable members into the overall scheme; the principal issue will be how knowledgeable in fact are the participants. But outside professionals who possess an appropriate state of mind (intent) and engage in appropriate conduct (facilitation) for aiding and abetting or agreement for conspiracy should, nevertheless, be responsibly under RICO, just like high-level insiders, whatever the character of the enterprise. Lower rung persons, too, who act under the direction of their superiors with the appropriate state of mind (knowledge and intent) should not be beyond the reach of RICO liability. Where outsiders or low-level participants are knowledgeably implicated in the management or operation of a pattern of racketeering activity in the affairs of an enterprise, or where they aid and abet or conspire with manage-

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tions for their own violation of the law, and it may provide political radicals with a desire to replace a corrupt system in which equal justice is little more than a spoken ideal.

John E. Conklin, *ILLEGAL BUT NOT CRIMINAL: BUSINESS CRIME IN AMERICA* 129 (1977) (citations omitted).

975. See *supra*, note 4 (analysis of treble damages).

ment to carry out such a pattern, § 1962(c) and § 1962(d) liability follows in a fashion wholly consistent with the Supreme Court's carefully crafted decision in *Reves*.

Congress did not draft "enterprise" as a rigid concept; it was designed to reflect great flexibility, so that RICO's remedial purposes could be realized. In each case, the *Reves* test must itself be tested against various possible enterprises; some will easily fit, while others may not meet the test. Mindlessness and inflexibility are all that is excluded. More attention, too, should be paid by the courts of appeal to doing substantial justice than playing traffic cop with technical rules of pleading, argument, or brief writing. The rules of the road are, of course, important, but the purpose of the road itself ought to be the guiding star. Rules are for processing litigation efficiently and fairly; litigation ought to be for doing justice between people. Indeed, *Reves* itself may be easily analyzed from alternative perspectives. If the RICO enterprise had been pled by the defrauded investors as the accounting firm or an association-in-fact of all defendants, the result in the Supreme Court may well have been different. Instead of arguing that Ernst & Young was involved in the operation or management of the Co-op, plaintiffs could have contended that its partners who performed the audits were involved in conducting the affairs of the accounting firm, or an appropriately pled association-in-fact enterprise. The predicate acts would have remained the same, but an alternative pleading of enterprise(s) would have given the defrauded plaintiffs the treble damage recovery that they so justly deserved.

Unless the courts set out to do what the Supreme Court says is a job for Congress,<sup>976</sup> traditional accomplice and conspiracy jurisprudence and the flexibility of the enterprise concept will serve to maintain RICO's effectiveness, not only against organized crime, but also against the fraud and white-collar crime that is so pervasive in our society. *Reves* properly focuses substantive RICO liability on an appropriate level of decision-making. Peripheral players should be dealt with under other theories of liability. The *Reves* decision should not be construed to provide blanket immunity—a safe harbor—for accountants, lawyers, or other professionals, as it is being read unthinkingly by some courts of appeals and district courts. A precise reading of the facts upon which the Supreme Court decided *Reves* indicates that accountants and other professionals are excluded from § 1962(c) liability *only* when their transgression is no more serious than failing to tell a corporate board of directors that assets should have been valued differently than the accounting firm choose to value them. That result should neither move plaintiffs to despair nor provide any comfort to the dishonest professional.<sup>977</sup>

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976. *H.J. Inc.*, 492 U.S. at 249 ([R]ewriting RICO is a job for Congress, if it is so inclined, and not for this Court.”).

977. For other not necessarily inconsistent views of *Reves* and its progeny, see Michael Vitiello, *More Noise from the Tower of Babel: Making “sense” out of Reves v. Ernst & Young*, 56 OHIO ST. L.J. 1396 (1995); Daniel R. Fischel & Alan O. Sykes, *Civil RICO after Reves: An Economic Commentary*, 1993 SUP. CT. REV. 157 (1994); Carie J. Disanto, Comment, *Reves v. Ernst & Young: The Supreme Court’s Enigmatic Attempt to Limit Outsider Liability Under 18 U.S.C. § 1962(c)*, 71 NOTRE DAME L. REV. 1059 (1996); Jeffrey N. Shapiro, Comment, *Attorney Liability Under RICO § 1962(c) After Reves v. Ernst & Young*, 61 U. CHI. L. REV. 1153 (1994); J. Todd Benson, Note, *Reves v. Ernst & Young: Is RICO Corrupt?* 54 LA. L. REV. 1685 (1994); Bryan T. Camp, *Dual Construction of RICO: The Road not Taken is Reves*, 51 WASH. & LEE L. REV. 61 (1994).

## APPENDIX A (CRIMINAL SANCTIONS)

1. *Criminal Sanctions*: The criminal enforcement provisions of RICO provide for fines, and criminal forfeiture. They authorize imprisonment of up to twenty years, or life, where the predicate offense authorizes a life sentence.<sup>1</sup> In conjunction with other sections of Title 18, RICO authorizes fines for RICO violations of up to \$250,000, if an individual is convicted. Section 1963(a) provides that violators "shall be fined under this title." Section 3571(b) of Title 18 provides for fines that an individual may be sentenced to pay.<sup>2</sup> Alternatively, a fine may be twice the gain or loss.<sup>3</sup> Further, sentencing courts can order defendants to pay restitution to victims of an offense.<sup>4</sup> RICO itself mandates that forfeiture can be of illicit proceeds, related property, or any interest in an enterprise.

2. *Supreme Court Decisions on Forfeiture*: In *Alexander v. United States*,<sup>5</sup> the Supreme Court upheld, over First Amendment objections, the forfeiture under RICO of the defendant's assets, which were used in the adult video entertainment business, based on a finding that several items sold at several stores were obscene. The appeal was remanded, however, to consider the claim, under the Excessive Fines Clause of the Eighth Amendment, that an *in personam* forfeiture order was excessive in light, not of the number of items sold, but the extensive criminal activity conducted by the defendant through his enormous racketeering enterprise over such a substantial period of time.<sup>6</sup> In *Libretti v. United States*, the Court also held that the inclusion of criminal forfeiture provisions in a guilty plea agreement does not require a trial court to find a factual basis in the forfeiture under Fed R. Crim. Pro. 11(F).<sup>7</sup>

3. *Enactment of Criminal Forfeiture Provisions*: In 1970, Congress reintroduced criminal forfeiture in American jurisprudence by the enactment of RICO.<sup>8</sup>

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1. 18 U.S.C. § 1963(a) (Supp. 1995).

2. 18 U.S.C. § 3571 (Supp. 1995).

3. *Id.* at § 3571(d).

4. *See* 18 U.S.C. §§ 3556, 3663-3664 (1985 & Supp. 1995).

5. 113 S. Ct. 2766 (1993).

6. The Court also decided that the Excessive Fines Clause applied to *in rem* civil forfeitures under other statutes in *Austin v. United States*, 113 S. Ct. 2801, 2804-12 (1993); *see also* *United States v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993) (absent exigent circumstances, due process requires notice and hearing before seizure of real property); *United States v. 92 Buena Vista Ave.*, 113 S. Ct. 1126 (1993) (innocent owner defense to drug forfeiture not limited to *bona fide* purchaser; relation-back doctrine not applied to effect forfeiture before decree; government becomes owner at date of decree not criminal conduct).

7. 116 S. Ct. 356, 362-64 (1995) (Forfeiture imposed under 21 U.S.C. § 848, (drugs) which in relevant part, is identical to 18 U.S.C. § 1963 (RICO)). Supreme Court jurisprudence on forfeiture is undergoing remarkable development. *See e.g.*, *United States v. Urseny*, 116 S.Ct. 2135 (1996) (in rem civil forfeiture does not preclude under double jeopardy subsequent criminal proceedings); *Bennis v. Michison*, 116 S. Ct. 994 (1996) (civil forfeiture of automobile jointly owned for spouse's sexual conduct not violation of due process or takings clause); *Degen v. United States*, 116 S. Ct. 1777 (1996) (Civil forfeiture claimant's failure to appear in criminal prosecution does not authorize summary judgment in favor of government).

8. 18 U.S.C. § 1963 *et. seq.* (1984 & Supp. 1995); *United States v. Huber*, 603 F.2d 387, 396 (2d Cir. 1979) (RICO first modern federal criminal statute to impose forfeiture as a criminal sanction against an individual), *cert. denied*, 445 U.S. 927 (1980).

Parallel provisions were also enacted in Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970.<sup>9</sup> The provisions are read similarly.<sup>10</sup> They are enforced *in personam* (criminally against the person), not *in rem* (civilly against the property).<sup>11</sup> "Upon this point a page of history is worth a volume of logic."<sup>12</sup> The forfeitures are mandatory in application, but flexible in amount.<sup>13</sup> They extend to any interest or proceeds acquired or maintained in violation of RICO and any interest in, security of, claim against, or property or contractual right affording a source of influence over, any enterprise established, operated, controlled, or conducted in violation of RICO.<sup>14</sup> They embody several interrelated purposes. First, they deprive a violator of property acquired through illegal activity on the theory that a person should not be allowed to profit from crime.<sup>15</sup> Second, by separating the violator from ill-gotten gains, they prevent the violator from delegating criminal activities to a colleague while in prison and resuming the activities once he serves his sentence.<sup>16</sup> Third, they provide the government with revenue to be used in fighting crime.<sup>17</sup>

4. *Use*: The use of the criminal forfeiture provisions of RICO and CCE was at first uneven at best.<sup>18</sup> Congress acted to strengthen the provision in

9. Continuing Criminal Enterprise Act (CCE), Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified as 21 U.S.C. § 801 *et. seq.* (1981 & Supp. 1995)). See *United States v. Pelullo*, 14 F.3d 881, 902 (3rd Cir. 1994).

10. *United States v. McKeithen*, 822 F.2d 310, 314-15 (2d Cir. 1987); *United States v. Amend*, 791 F.2d 1120, 1127 n.6 (4th Cir. 1986).

11. *United States v. Caporale*, 806 F.2d 1487, 1509 (11th Cir. 1986), *cert. denied*, 482 U.S. 913, and *cert. denied*, 483 U.S. 1021 (1987).

12. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.). See generally G. Robert Blakey, *RICO: The Federal Experience (Criminal and Civil) and an Analysis of Attacks Against The Statute*, in *ORGANIZED CRIME IN THE UNITED STATES*, 453-55 (Robert J. Kelly, Ko-hin Chin, & Reefus Schatzberg eds., 1994) (tracing the history of civil and criminal forfeiture to Biblical, Greek, Roman and English law as well as colonial practice).

13. Compare *United States v. Hess*, 691 F.2d 188, 190 (4th Cir. 1982) (mandatory), with *Russello v. United States*, 464 U.S. 16, 20-22 (1983) (extends to all ill-gotten proceeds).

14. 18 U.S.C. § 1963(a) (Supp. 1995).

15. *Russello*, 464 U.S. at 28 ("to remove the profit from organized crime by separating the racketeer from his dishonest gains"); Elizabeth A. Skorcz, *RICO Forfeiture: Secured Lenders Beware*, 37 UCLA L. REV. 1199, 1207 (1990).

16. S. REP. NO. 617, 91-617 at 80 (1969).

17. *Caplin & Drysdale v. United States*, 491 U.S. 617, 629 (1989). For an analysis of the background, scope, and application of RICO's forfeiture provision, see generally, U.S. DEPARTMENT OF JUSTICE, *RACKETEER INFLUENCED AND CORRUPT ORGANIZATION (RICO): A MANUAL FOR FEDERAL PROSECUTORS* 103-38 (3rd rev. ed. September 1990) ("forfeiture provisions . . . are integral part of a RICO prosecution and should be used whenever possible").

18. *Forfeiture of Narcotics Proceeds: Hearings Before the Subcomm. on Criminal Justice of the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. 96-97, 114 (1980) (testimony of Dep. Atty Gen Irvin B. Nathan) (three problems: 1) ascertaining what the assets are, 2) reaching them if they are in the hands of third parties, and 3) preventing their dissipation before trial; problems compounded since "sophisticated criminals . . . have access to the best lawyers and accountants money can buy"); COMPTROLLER GENERAL, *STRONGER FEDERAL EFFORT NEEDED IN FIGHT AGAINST ORGANIZED CRIME* 31-34 (1981) (problems in criminal forfeiture: 1) uncertain status of assets, 2) third party holdings, and 3) dissipation prior to seizure); COMPTROLLER GENERAL, *ASSET FORFEITURE--A SELDOM USED TOOL IN COMBATTING DRUG TRAFFICKING* 30-42 (1981) (same); JOSEPH CALIFANO, *THE 1982*

1984.<sup>19</sup> The criminal and civil forfeiture provisions of RICO, CCE, and a variety of other statutes are widely employed today. Currently, criminal or civil forfeiture is authorized by more than 100 federal statutes providing for confiscation of everything from diseased poultry,<sup>20</sup> to pornographic magazines.<sup>21</sup> The enforcement of federal forfeiture statutes realized \$3.5 billion for the Asset Forfeiture Fund of the Department of Justice between 1985 and 1994.<sup>22</sup> The largest individual forfeiture to date was imposed on Michael R. Milken, the "junk bond king."<sup>23</sup> The pleas were far from "technical violations of obscure securities laws. . . . [T]hey portray[ed] a financier . . . that . . . seemed to believe himself beyond the reach of law . . . ."<sup>24</sup> Attorney General Richard Thornburgh characterized the offenses as "some of the most serious efforts undertaken to . . . subvert Wall Street's securities markets."<sup>25</sup> Harvey Pitt, a leading securities lawyer, noted, "[the plea] vindicates the whole prosecutorial effort . . . ."<sup>26</sup> Richard C. Brieden, the chairman of the Securities and Exchange Commission, commented, "[d]espite the effort to mold public opinion, . . . . [the plea] demonstrate[s] that . . . [Milken] stood at the center of a network of manipulation, fraud and deceit."<sup>27</sup> In pleading guilty, Milken acknowledged that he "was wrong . . . and knew . . . [it] at the time."<sup>28</sup> In pleading not guilty four years ago, he said, "I am confident that in the end I will be vindicated."<sup>29</sup> Milken was sentenced to ten years imprisonment in

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REPORT ON DRUG ABUSE AND ALCOHOLISM 97 (1982) ("greater use of federal statutes [like RICO] and [the Controlled Substances Act] should be amended to provide for the forfeiture of all profits of . . . enterprise").

19. U.S. DEPARTMENT OF JUSTICE, HANDBOOK ON THE COMPREHENSIVE CRIME CONTROL ACT OF 1984 AND OTHER CRIMINAL STATUTES ENACTED BY THE 98TH CONGRESS 43-57 (Dec. 1984).

20. 21 U.S.C. § 467a (1984).

21. 18 U.S.C. § 1466 (Supp. 1995). Examples of non-drug related civil forfeiture statutes include 18 U.S.C. § 981 (Supp. 1995) (allowing forfeiture of any property involved in illegal money laundering transactions); 18 U.S.C. § 512 (Supp. 1995) (allowing forfeiture of vehicles that have removed, obliterated, or altered identification numbers); 18 U.S.C. § 1955(d) (1984) (allowing forfeiture of any property used in conducting an illegal gambling business); and 18 U.S.C. § 2254 (Supp. 1995) (allowing forfeiture of objects depicting minors engaged in sexually explicit conduct). See Elizabeth A. Skorcz, *supra* note 15 at 1204 & n.26 (collecting federal statutes).

22. *Department of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations for 1995: Hearings Before the Subcomm. on Appropriations of the House Comm. on Finance*, 103rd Cong., 2d Sess. 781 (1994) (testimony of Dep. Atty. Gen. Cary H. Copeland).

23. *Public Confession: Milken Pleads Guilty to Six Felony Counts*, WALL ST. J., April 25, 1990, at A1, col. 1 (reporting pleading to defrauding investors, cheating clients, taking unlawful secret positions in stock, aiding income tax evasion, illegally concealing true ownership, and evading net-capital rules and settling for \$600 million, \$200 million in fines and \$400 million for fund to compensate victims).

24. *Id.*

25. *Id.* at A12.

26. Laurie D. Cohen *Plea Bargains Merit Balance Rewards vs. Risks in Settlements Such as Milken*, WALL ST. J., April 24, 1990, at B1, col. 3.

27. Gregory A. Robb *SEC Chief Calling for Long Term*, N.Y. TIMES, April 25, 1990, at C7, col. 4.

28. *Text of Statement to Court Describing 6 Felonies*, N.Y. TIMES, April 25, 1990, at 10.

29. *Friends Defend Junk-bond King*, THE DETROIT NEWS, April 22, 1990, at 3A, col. 2 (reporting that evidence that led to Milken's plea bargains began with single-page letter in broken English that arrived at the Merrill Lynch securities firm in May, 1985, but ultimately culminated in at least a dozen witnesses close to Milken who gave prosecutors their case); see also Laurie P. Cohen *How Michael Milken Was Forced to Accept the Prospect of Guilt*, WALL ST. J., April 23, 1990, at 1, col. 6 (reporting grand jury was about to return superseding indictment including

1990.<sup>30</sup> Milken is out of prison; he is an "advisor" in corporate mergers.<sup>31</sup>

5. *Abuse*: The use of criminal and civil forfeiture is controversial.<sup>32</sup> The Supreme Court is stepping in to correct abuse.<sup>33</sup>

6. *Third Party Rights*: Few persons sympathize with the dealer in junk, drugs, or bonds, who forfeits his ill-gotten gains. Few persons also own property singularly or in fee simple. Both domestic and other kinds of partners as well as a wide variety of persons, including those to whom property is transferred, often possess interests in property subject to forfeiture.<sup>34</sup> Lend your car to a friend; if he transports marijuana, the car may be subject to forfeiture.<sup>35</sup> Section 1963(l) of title 18 and parallel provisions provide, however, a procedure for third party interests to be asserted after criminal forfeiture.<sup>36</sup> If the third party can establish by a preponderance of the evidence that he possesses a "legal right" in the property "superior" to the defendant's or that he was a bona fide purchaser, the court must amend the order of forfeiture vesting title in the government to reflect the third party's rights.<sup>37</sup> These provisions were introduced and enacted to protect third

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new charges of insider trading, bribery, cheating customers, and destroying incriminating evidence). See generally Connie Bruck, *THE PREDATORS' BALL: THE INSIDE STORY OF DREXEL BURNHAM AND THE RISE OF THE JUNK BOND RAIDERS* 360-72 (1989); *Myths*, *supra* note 2, at 895 n.119 (analysis of bankruptcy of Drexel Burnham Lambert, "Ponzi" schemes, and RICO).

30. Kurt Eichenwald, *Decision Difficult for Milken Judge* N.Y. TIMES, Nov. 21, 1990, D1, Col. 3. But see Kurt Eichenwald, *Judge who gave Milken 10 years eligible for parole*, N.Y. TIMES, Feb. 20, 1991, at D1, col. 3 (reporting Judge recommended that Milken be eligible for parole after three years).

31. Steven Lipin, *Mike Milken Will Get \$50 Million Payment For Helping Turner*, WALL ST. J., Sept. 29, 1995, at A1, col. 1 (reporting Milken's involvement in Time Warner Inc.'s \$7.5 billion purchase of Turner Broadcasting System Inc.).

32. Compare *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 515 (1993) (Thomas, J. concurring and dissenting), and *United States v. \$191,910.00 in U.S. Currency*, 16 F.3d 1051, 1068-69 (9th Cir. 1994), and *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 905 (2d Cir. 1992), and David B. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 1.0-2 at 1-19 (1985 & Supp. 1994), with U.S. DEPARTMENT OF JUSTICE, *SUMMARIES OF FEDERAL ASSET FORFEITURE CASES CRITICIZED BY NEWS MEDIA* (March 1994).

33. See, e.g., *Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937, 1945 (1994) ("A defendant convicted and punished for an offense may not have a nonremedial civil penalty imposed against him for the same offense in a separate proceeding."); *James Daniel Good Real Property*, 114 S. Ct. at 505 (holding due process clause to require the government to afford notice and an opportunity to be heard before seizing real property subject to civil forfeiture); *Austin v. United States*, 113 S. Ct. 2801, 2803 (1993) (despite guilty-property fiction, civil forfeitures may constitute excessive fines under the Eighth Amendment); *United States v. 92 Buena Vista Ave.*, 113 S. Ct. 1126, 1135-36 (1993) (plurality opinion) (allowing donees and other post-illegal act transferees of forfeitable property to claim "innocent owner" protection); *Republic Nat'l Bank v. United States*, 113 S. Ct. 554, 562 (1992) (government cannot deprive the appellate court of jurisdiction by transferring forfeited property out of district).

34. See generally, Michael Goldsmith & Mark Jay Linderman, *Asset Forfeiture and Third Party Rights: The Need for Further Law Reform*, 1989 DUKE L.J. 1254, 1257 ("Innocent third parties include owners, lienholders, unsecured creditors, bona fide purchasers, business partners, corporate shareholders, joint tenants, and many others.").

35. See, e.g., *United States v. One 1986 Mercedes-Benz*, 846 F.2d 2, 4 (2d Cir. 1988).

36. 18 U.S.C. § 1963 (Supp. 1995).

37. *Id.* at § 1963(l)(6)(A)-(B).

party rights.<sup>38</sup> Their scope is in dispute. The status of victims of RICO violations is most problematic.

7. *Critique of BCCI Holdings*: In *United States v. BCCI Holdings*,<sup>39</sup> the District of Columbia Circuit held that a class of defrauded depositors in the failed Bank of Credit and Commerce International (BCCI) who lost \$8 billion in July 1991 when bank regulators seized the bank could not assert an interest in over \$550 million in forfeited funds. The BCCI forfeiture is the largest reported entity forfeiture to date.<sup>40</sup> Subsequent to its seizure by regulators, the bank pled guilty to a RICO indictment. The plea agreement required the bank to forfeit to the Department of Justice all of BCCI's assets in the United States. One half of the assets would be transferred to the international liquidation proceedings; one half would be transferred to the Attorney General to offset losses to the bank insurance fund of the Federal Deposit Insurance Corporation and related law enforcement expenses. The plea agreement was unsuccessfully challenged in New York.<sup>41</sup> The District Court in the District of Columbia then denied to the depositor class the right to assert a constructive trust as "inappropriate;" no hearing was granted.<sup>42</sup> The court of appeals affirmed; it denied the depositors claim outright.<sup>43</sup>

*BCCI Holdings* is wrongly decided. First, Congress did not intend in RICO to supersede normal bankruptcy priorities.<sup>44</sup> Had the government not seized BCCI's assets, but sought to enforce its forfeiture in a bankruptcy proceeding, its distribution priority would be fourth.<sup>45</sup> Unsecured creditors are third.<sup>46</sup> Second,

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38. See 129 CONG. REC. 53989 (Sen. Biden) ("[legislation must] provide for [the] orderly consideration of third party rights, taking into account the requirements of due process").

39. 46 F.3d 1185, 1190 (D.C. Cir.) (holding "legal" to mean "lawful," not "legal" as opposed to "equitable"; defrauded depositors denied constructive trust in property obtained by fraud by bank from depositors), *cert. denied*, 115 S. Ct. 2613 (1995).

40. See generally, SUBCOMM. ON TERRORISM NARCOTICS AND INT'L OPERATIONS, THE BCCI AFFAIR: A REPORT TO THE SENATE COMMITTEE ON FOREIGN RELATIONS 64 (Staff Report Sept. 1992) ("the largest case of organized crime in history"; concluding (1) BCCI constituted international financial crime on a massive and global scale; (2) systematically bribed world leaders and political figures throughout the world; (3) developed a strategy to infiltrate the U.S. banking system, which it successfully implemented, despite regulatory barriers designed to keep it out; and (4) that the Bank's accountants failed to protect BCCI's innocent depositors and creditors from the consequences of poor practices at the Bank of which the auditors were aware for years); GENERAL ACCOUNTING OFFICE, FOREIGN BANK—INITIAL ASSESSMENT OF CERTAIN BCCI ACTIVITIES IN THE UNITED STATES (Sept. 1992).

41. In *Re Smouna*, 136 B.R. 921 (S.D.N.Y.), *appeal dismissed*, 979 F.2d 845 (2d Cir. 1992).

42. *United States v. BCCI Holdings*, 833 F. Supp. 9, 14 (D.D.C. 1993).

43. 46 F.3d at 1190.

44. 84 Stat. 947 (1970) ("shall not supersede").

45. 11 U.S.C. § 726(a)(4) (1993 & Supp. 1996).

46. § 726(a) (3); In *Re Ryan*, 15 B.R. 514 (Bankr. D. Md. 1981). Compare In *re Omega Group, Inc.*, 16 F.3d 1443, 1448-53 (6th Cir. 1994) (holding that constructive trust may not be used to vest unsecured creditor with rights greater than those provided for under federal bankruptcy law), and *Downriver Community Fed. Credit Union v. Penn Square Bank*, 879 F.2d 754, 758 (10th Cir. 1989) (holding that constructive trust may not be used to give uninsured bank depositors greater rights than otherwise available under federal banking law), *cert. denied*, 493 U.S. 1070 (1990), with *St. Louis & S.F. Ry. Co. v. Johnston*, 133 U.S. 566, 576-77 (1890) and *Carnegie-Illinois Steel Corp. v. Berger*, 105 F.2d 485, 487 (3d Cir.), *cert. denied*, 308 U.S. 603 (1939), and *Standard Oil Co. v. Elliott*, 80 F.2d 158, 161 (4th Cir. 1935), and *Federal Reserve Bank v. Omaha Nat'l Bank*, 45 F.2d 511, 519 (8th Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

the court's decision hardly reflects the jurisprudence of its sister circuits.<sup>47</sup> Third, the depositors were, of course, not parties to the criminal proceeding in which BCCI pled guilty to the RICO violations.<sup>48</sup> To extinguish the depositors' interest required, not only notice and a hearing, but appropriate procedural protections. Because the government seized BCCI's property, the proceedings were, not like a bill of peace, which is equitable in character, but like an action for ejectment, which is legal in character. Accordingly, the depositors were entitled to a jury trial under the Seventh Amendment.<sup>49</sup> Even *in rem* forfeitures may implicate jury trial considerations.<sup>50</sup>

Statutes should be construed under well-settled rules of interpretation in order to avoid constitutional issues.<sup>51</sup> Thus, § 1963 of RICO ought not to be read to deprive an innocent third party of his interest in property without notice, hearing, or other procedural protection. In *Peisch v. Ware*,<sup>52</sup> for example, where the removal of the goods from the custody of the revenue officer occurred not by theft or robbery, but pursuant to a writ of replevin issued by a state court,<sup>53</sup> Chief Justice Marshall construed a civil *in rem* forfeiture statute to protect basic property rights, stating that "[i]f, by private theft, or open robbery, without any fault on his part, his property should be invaded . . . the law cannot be understood to punish him with the forfeiture of that property."<sup>54</sup> Thus, *Peisch* stands for the general principle that "the law is not understood to forfeit the property of owners or consignees, on account of the misconduct of mere strangers, over whom such owners or consign-

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47. See, e.g., *United States v. Schwimmer*, 968 F.2d 1570, 1582 (2d Cir. 1992) (holding "legal" to mean "under the law"; "a constructive trust may be a superior interest under § 1963(1) (6) (A)"); *United States v. Lavin*, 942 F.2d 177, 187 (3d Cir. 1991) (same under CCE), *aff'd*, 942 F.2d 177 (3d Cir. 1991); *United States v. Campos*, 859 F.2d 1233, 1238-39 (6th Cir. 1988) (stating in dicta: a "constructive" trust is "superior" under CCE); *United States v. Marx*, 844 F.2d 1303, 1308 (7th Cir. 1988) (constructive trust warrants modification of a forfeiture under CCE); *United States v. Reckmeyer*, 836 F.2d 200, 205 (4th Cir. 1987) (using broad view of "legal interest" for CCE); see also *Torres v. \$36,256.80 U.S. Currency*, 25 F.3d 1154, 1158-59 (2d Cir. 1994) (same; 21 U.S.C. § 881).

48. See 18 U.S.C. § 1963(i) (Supp. 1995) (no right to intervene or initiate action to challenge validity of forfeiture) and *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100 (1969). The Court in that case stated:

[I]t is elementary that one is not bound by a judgment *in personam* resulting from litigation in which he is not designated as a party or to which he is not designated as a party or to which he has not been made a party by service of process.

*Zenith Radio Corp.*, 395 U.S. at 110. See also *United States v. Kramer*, 912 F.2d 1257, 1261 (11th Cir. 1990) (holding third parties are not bound by criminal *in personam* forfeiture verdicts).

49. Compare *Chauffeurs Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990) (construing seventh amendment right to jury trial to be governed by history and nature of remedy sought), with *Humble Oil & Refining Co. v. Sun Oil Co.*, 191 F.2d 705, 717-21 (5th Cir. 1951) (comparing ejectment and bill of peace "in" possession and "out of" possession), *cert. denied*, 342 U.S. 920 (1952).

50. See, e.g., *United States v. One 1976 Mercedes Benz*, 618 F.2d 453, 456-58 (7th Cir. 1980) (requiring jury trial if personality is seized on land).

51. *New York v. United States*, 505 U.S. 144, 170 (1992).

52. 8 U.S. (4 Cranch) 347 (1808).

53. *Id.* at 360.

54. *Id.* at 364.



ees could have no control."<sup>55</sup> Here, too, RICO should be read to protect—not violate—third party rights.<sup>56</sup> The Constitution requires more—not less—rights when a forfeiture proceeding is *in personam*.

Fourth, the government argued in the Court of Appeals that the validity of the depositors constructive trust theory was a matter of federal law; in fact, the issue turns on state (or other) law as it is incorporated into federal law.<sup>57</sup> In addition, while the depositors' "right, title, or interest" in the forfeited property was termed a "constructive trust," it might just as easily be termed an "equitable lien" or "an action for money had and received," as these claims are traditionally alternative theories for legally recovering money taken by fraud.<sup>58</sup> Either way, their interest should trump the government's criminal forfeiture. When the Senate Judiciary Committee reported on the bill that is reflected in the text of § 1963(1), the committee observed that the Department of Justice changed its position on the propriety of the remission and mitigation proceedings under their 18 U.S.C. § 1963(c) as the only source of relief for third parties whose property interests were compromised by an *in personam* forfeiture order.<sup>59</sup> The committee then expressed its view that third parties were entitled to judicial review of their claims:

Criminal forfeiture is an *in personam* proceeding. Thus, an order of forfeiture may reach only property of the defendant, save in those instances where a transfer to a third party is voidable. Thus, if a third party can demonstrate that his interest in the forfeited property is exclusive of or superior to the interest of the defendant, the third party's claim renders that portion of the order of forfeiture reaching his interests invalid. The Committee strongly agrees with the Department of Justice that such third parties are entitled to judicial resolution of their claims.<sup>60</sup>

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55. *Id.* at 365.

56. *See Austin*, 113 S. Ct. at 2809 (question "expressly reserved" whether "truly innocent owner's" rights could be forfeited in rem) (citing *J.W. Goldsmith-Grant Co. v. United States*, 254 U.S. 505, 512 (1921), and *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-90 (1974)).

57. *See, e.g., Ocean Energy II, Inc. v. Alexander & Alexander*, 868 F.2d 740, 743-46 (5th Cir. 1989).

58. *See, e.g., Provencher v. Berman*, 699 F.2d 568, 569-70 (1st Cir. 1983) (Breyer, J.) (following Massachusetts law, but recognizing "virtually universal rule" that fraud gives rise to equitable lien or a constructive trust); *Walker v. The Ware, Hadhan & Buntingford Ry. Co.*, 1 Equity Cas. 195, 199 (1865) (equitable lien: [I]t is said the enforcement of the lien would interfere with the rights of the public [in the railroad] . . . [B]ut can it be said that a railway company may take a man's land [by condemnation] without paying for it and when he seeks to enforce payment . . . set up as a defense the rights of the public? . . . The public . . . cannot be interested in having a man deprived of his property); JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 1219 (1st Eng. ed. 1884) ("The principle upon which courts of equity have proceeded in establishing [an equitable] lien, in the nature of a trust is, that a person . . . ought not, in conscience, as between them, be allowed to keep it . . .").

59. *See Lavin*, 942 F.2d at 185 (exclusive remedy); *L'Hoste*, 609 F.2d at 812 (discretionary; not subject to judicial review).

60. S. REP. NO. 98-225 at 208 (1983); *see also Shwimmer*, 968 F.2d at 1580 (holding general creditor's interest not to invalidate forfeiture order in subject property); *Reckmeyer*, 836 F.2d at 207-08; *Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 4-16, 15 (1983) (testimony of James Knapp, Dep. Ass't Atty Gen.) (suggesting that judicial resolution is appropriate for third parties whose interests are "by their very nature inconsistent with the order of forfeiture").

Thus, in subparts (A) and (B) of § 1963(1)(6), Congress afforded two categories of third parties standing to petition the courts to determine the validity of their claims to forfeited assets. Standing to petition exists:

[F]irst, where the petitioner had a legal interest in the property that, at the time of the commission of the acts giving rise to the forfeiture, was vested in him rather than the defendant or was superior to the interest of the defendant; or second, where the petitioner acquired his legal interest after the acts giving rise to the forfeiture but did so in the context of a bona fide purchase for value and had no reason to believe that the property was subject to forfeiture.<sup>61</sup>

“Congress derived both exceptions essentially from hornbook commercial law.”<sup>62</sup> The first exception reflects the common law principle embodied in the venerable maxim *nemo dat qui non habet* that a buyer acquires no better title than that of the seller.<sup>63</sup> Under the “relation-back” doctrine utilized in criminal forfeiture cases,<sup>64</sup> the government asserted that it acquired its interest in the defendant’s forfeited property at the time of the commission of the criminal acts giving rise to the forfeiture order. Nevertheless, “if a third party’s interest in the forfeited property, at the time of the criminal acts, was superior to the criminal defendant’s interest, then the interest that the government acquires when it steps into the defendant’s shoes is subordinate to that of the third party.”<sup>65</sup> While the circuit court of appeals acknowledged this exception to the relation-back doctrine, it simultaneously ignored the severe limitations on the doctrine imposed by *92 Buena Vista Ave.*<sup>66</sup> Recognizing that the insured’s rights under a fire insurance policy are fixed both as to the amount and standing to recover at the time of the fire loss<sup>67</sup>—just as the depositor’s constructive trust or equitable lien arose when they were fraudulently induced to deposit their money into the BCCI Banks—the Second Circuit relied on *92 Buena Vista Avenue* to support its holding protecting the innocent property owner’s rights:

The foregoing compels the conclusion that not every right of the owner is lost by virtue of the relation-back of title. Among the rights that survive are rights under a fire insurance policy which, as previously noted, “are fixed both as to amount and standing to recover at the time of the fire loss.” Here, the government did not win a final judgment of forfeiture until long after the loss

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61. S. REP. NO. 98-225 at 209 (1983).

62. *Lavin*, 942 F.2d at 185.

63. *Id.*; BLACK’S LAW DICTIONARY 1037 (6th ed. 1990) (“He who hath not cannot give.”).

64. *92 Buena Vista Ave.*, 113 S. Ct. at 1135-36 (plurality op.).

65. *Lavin*, 942 F.2d at 185.

66. 113 S. Ct. at 1135-36. *See, e.g.*, *Counihan v. Allstate Ins. Co.*, 25 F.3d 109 (2d Cir. 1994). In that case, the Second Circuit held that the relation-back provision of the drug offense forfeiture statute, 21 U.S.C. § 881(h)—that is identical to RICO’s relation back provision, 18 U.S.C. § 1963(c)—could not divest a property owner of an insurable interest so as to bar recovery on a fire insurance policy, where the fire loss occurred before the government acquired title to the property pursuant to a final decree of forfeiture.

67. *Id.* at 111.

by fire of the property in which plaintiff clearly had an insurable interest. By the time that judgment was entered, the right of plaintiff to assert a claim under her insurance policy had become fixed. Simply put, the government could not contend that it owned the property until a judgment of forfeiture was entered. By then, Allstate's obligation to pay had become fixed under plaintiff's policy and that obligation could not be discharged by the operation of the legal fiction known as relation-back.<sup>68</sup>

The *BCCI Holdings* court also mischaracterized the nature of a constructive trust when it wrongly stated that "[i]t could not have been shown to exist at the time the [illegal] acts were committed" by BCCI.<sup>69</sup> Under well-settled law, the depositor's constructive trust (or equitable lien) came into existence *when* they were defrauded into depositing their money into BCCI, a criminal enterprise, that is, prior to the forfeiture. After discussing the differences between "legal" and "equitable" interests, the court stated that "we agree with our sister circuits that have rejected the notion that Congress intended to draw the ancient, but largely ignored, distinction between technically legal and technically equitable claims in forfeiture challenges,"<sup>70</sup> because "[i]t seems to us that it would just as much offend notions of due process for the government to scoop up property in which a third party has certain kinds of equitable interests as it would for the government to take property in which a third party has a 'legal' interest" and "focusing on the distinction between equitable and legal interests obscures Congress' real intent."<sup>71</sup> Nevertheless, it misconstrued the character of a constructive trust (or an equitable lien) and RICO's text and purpose in holding that the depositor's interest in BCCI's forfeited assets was not "vested" or was not "superior" to BCCI's interest, when BCCI committed the criminal acts that gave rise to the 1992 RICO guilty plea and forfeiture order. To prevail, the depositors had to assert an interest in the forfeited funds that was superior to BCCI's interest at the time of the commission of its RICO predicate acts. "[S]uch a superior interest . . . [was] clearly . . . one in the nature of a lien, mortgage, recorded security device, constructive trust, valid assignment, or the like."<sup>72</sup> Thus, BCCI held the funds of the defrauded depositors subject to an equitable lien or as a constructive trustee in favor of the depositors.<sup>73</sup> BCCI, in short, never had unqualified property interests in the stolen money that

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68. 25 F.3d at 113 (citations omitted). *Accord* United States v. 41741 National Trails Way, 989 F.2d 1089, 1091-92 (9th Cir. 1993) (holding that government's retroactive title does not defeat attorney's lien for fees incurred in defending against forfeiture); United States v. Moffitt, Zwerling & Kemler, P.C., 875 F. Supp. 1190 (E.D. Va. 1995).

69. 46 F.3d at 1191.

70. 46 F.3d at 1190 (citing *Schwimmer*, 968 F.2d at 1582; *Lavin*, 942 F.2d at 185 n.10; and *Campos*, 859 F.2d at 1238-39).

71. *Id.*

72. *Campos* 859 F.2d at 1238-39. *Accord* *Marx*, 844 F.2d at 1307-08; *Schwimmer*, 968 F.2d at 1581-82.

73. *SEC v. Paige*, 1985 U.S. Tax Cas. (CCH) ¶9588, at 89,506 (D.D.C. July 30, 1985) (under general rule of common law the victim, and not the embezzler, retains title to funds), *aff'd*, 810 F.2d 307 (D.C. Cir. 1987).

could be forfeited to the government under RICO.<sup>74</sup>

Instead, the *BCCI Holdings* court mischaracterized the constructive trust asserted by the depositors, saying that “[a] constructive trust is a remedy that a court devises *after* litigation. It is, as we have noted, a fictional trust—not a real one. *It could not have been shown to exist at the time the acts were committed*” by BCCI.<sup>75</sup> In fact, constructive trusts and equitable liens are long-recognized features of common law jurisprudence.<sup>76</sup> Speaking for the New York Court of Appeals, Justice Cardozo stated, “a constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.”<sup>77</sup> Thus, “[a] court of equity may prevent the unjust enrichment of a defendant by compelling him to surrender to the plaintiff property held by him, thus enforcing a constructive trust, or by giving the plaintiff a security interest in the property held by the defendant, thus imposing an equitable lien.”<sup>78</sup>

Similar definitions are reflected in English law and elsewhere.<sup>79</sup> Accordingly, property obtained by fraud presents the classic case for imposition of a constructive trust. “[T]he acquisition of property through the fraudulent misrepresentation of a material fact has been held sufficient grounds to fasten a constructive trust on the property.”<sup>80</sup> The imposition of a constructive trust or equitable lien was particularly appropriate where the depositors alleged that they were fraudulently induced to deposit their money into BCCI, a phony bank.

Even in the case of a general deposit, a bank becomes constructive trustee of the money deposited if it is guilty of fraud in obtaining the deposit. . . . [A] bank that receives deposits when it knows that it is hopelessly insolvent becomes a constructive trustee of the money deposited, and the depositor is entitled to priority over the general creditors of the bank . . . .<sup>81</sup>

74. *SEC v. Levine*, 689 F. Supp. 317, 321-22 (S.D.N.Y. 1988), *aff'd in part and rev'd in part on other grounds*, 881 F.2d 1165 (2d Cir. 1989).

75. 46 F.2d at 1190-91 (second emphasis added).

76. *See, e.g., Moore v. Crawford*, 130 U.S. 122, 128 (1889).

77. *Beatty v. Guggenheim Exploration Co.*, 122 N.E. 378, 380 (1919). *See also Healy v. Commissioner*, 345 U.S. 278, 282 (1953) (“[a] constructive trust is a fiction imposed as an equitable device for achieving justice”).

78. *V. AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS* § 463, at 331 (4th ed. 1989). *See also In re Lela & Co.*, 551 F.2d 399, 406-07 (D.C. Cir. 1977).

79. *See, e.g., Hussey v. Palmer*, 3 All E.R. 744, 747, 1 W.L.R. 1286 (1972); *McCormick v. Grogan*, 4 L.R.E. & I. App. 82, 88, 97 (1869); *Rolfe v. Gregory*, 4 De G.J.&S. 576, 579 (1864); *RESTATEMENT (SECOND) OF TRUSTS* § 1, comment e (1959); *RESTATEMENT OF RESTITUTION* § 160 (1937). *See generally* I GEORGE E. PALMER, *THE LAW OF RESTITUTION* § 1.3, at 9-16, § 1.5(a), at 20-21 (1989) (tracing the history of constructive trusts and equitable liens in England and the U.S.).

80. *Osin v. Johnson*, 243 F.2d 653, 656 (D.C. Cir. 1957). *See also Old Security Life Ins. Co. v. Continental Ill. Nat'l Bank & Trust Co.*, 740 F.2d 1384, 1397 (7th Cir. 1984); *China Fire Ins. Co. v. Davis*, 50 F.2d 389, 391 (2d Cir.) (L. Hand, J.), *cert. denied*, 284 U.S. 658 (1931). *See generally* V. SCOTT, *LAW OF TRUSTS* § 462, at 302; I PALMER, *RESTITUTION* §§ 3.2-3.3, at 232-37.

81. V. SCOTT, *supra*, note 78, at § 529, at 690-61.

This rule has been followed in this country for over a century.<sup>82</sup> The *BCCI Holdings* court's mischaracterization of a constructive trust also places it in direct conflict with its sister circuits, which uniformly hold that a constructive trust arises when the fraudulent acts are committed.<sup>83</sup> Thus, the court distorted general jurisprudence when it characterized the depositors' constructive trust as "a retroactive legal fiction," and it ignored well-settled authority when it said that a constructive trust "reaches back to snatch the [forfeited] property away from" the government.<sup>84</sup>

The court also ignored 92 *Buena Vista Ave.*, which granted the protection of the "innocent owner" defense to the donees of forfeitable property and held that the government may no longer utilize the doctrine to deprive donees and post-illegal act transferees the opportunity to raise the innocent owner defense.<sup>85</sup> In brief, 92 *Buena Vista Ave.* held that the relation-back doctrine vests ownership of forfeitable property in the government only *after* the entry of a final order of forfeiture, rather than vesting title in the government at the moment of the illegal acts. Instead, the court used the "relation-back" doctrine to trump the depositor's constructive trust claim, stating that when it enacted RICO, "Congress . . . devised a statutory remedial scheme that reaches back to the time of the criminal acts to forfeit the property to the United States."<sup>86</sup>

RICO, of course, provides that the government's title vests "upon the commission of the act giving rise to the forfeiture,"<sup>87</sup> that is, when the RICO defendant commits the predicate acts of racketeering.<sup>88</sup> The court, however, forgot that BCCI's plea of guilty in 1992 related to predicate acts and resulting RICO violations arising out of its infiltration of U.S. banks, not its fraudulent inducement of the depositor's deposits, which occurred years earlier. In *In re Metmor Fin., Inc.*,<sup>89</sup> the Fourth Circuit, for example, held that because the lienholder's interest

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82. See, e.g., *St. Louis & S.F. Ry. Co. v. Johnston*, 133 U.S. 566 (1890); I. PALMER, *RESTITUTION* § 1.5(a), at 21 ("One of the significant effects of both constructive trust and equitable lien is to give priority over the claims of general creditors when a claimant's funds are traced into the assets of an insolvent estate").

83. See, e.g., *Chiu v. Wong*, 16 F.3d 306, 310 (8th Cir. 1994) (applying Minnesota law: "The right to a constructive trust arose at the time of the wrongful conversion.") (citation omitted). *Accord* *Mitsubishi Int'l Corp. v. Cardinal Textile Sales*, 14 F.3d 1507, 1518 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1092 (1995); *Hanson v. FDIC*, 13 F.3d 1247, 1253 (8th Cir. 1994); *United States v. Holzer*, 840 F.2d 1343, 1347 (7th Cir.), *cert. denied*, 486 U.S. 1035 (1988); *Capital Investors Co. v. Executors of Estate of Morrison*, 800 F.2d 424, 427 n.5 (4th Cir. 1986); *In re General Coffee Corp.*, 64 B.R. 702, 707 (S.D. Fla. 1986), *aff'd*, 828 F.2d 699 (11th Cir. 1987), *cert. denied*, 485 U.S. 1007 (1988).

84. 46 F.3d at 1191.

85. 113 S. Ct. at 1135-36.

86. 46 F.3d at 1191.

87. 18 U.S.C. § 1963(c).

88. See Elizabeth A. Skorcz, *supra* note 15 at 1214; *United States v. One Parcel of Real Estate Property*, 660 F. Supp. 483, 487 (S.D. Miss.), *aff'd on other grounds*, 831 F.2d 566 (5th Cir. 1987); Mark A. Jankowski, Note, *Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 VA. L. REV. 165, 175-76 (1990).

89. 819 F.2d 446 (4th Cir. 1987).

arose before the illegal activity, the title that vested in the government was already encumbered. Relying on *United States v. Stowell*,<sup>90</sup> where, because the plaintiff obtained a mortgage interest in the property before any illegality occurred, the Supreme Court held that "the mortgage . . . was valid as against the United States," the Fourth Circuit correctly emphasized that "the government can succeed to no greater interest in the property than that which belonged to the wrongdoer whose actions have justified the seizure."<sup>91</sup> Accordingly, *BCCI Holdings* was wrongly decided; it worked a grave injustice to the defrauded depositors.

8. *Critique of Hamid. Chawla* litigated the efforts of a class of defrauded depositors of BCCI to secure its claims against assets criminally forfeited by the government; the class failed in the District of Columbia Circuit. In *Hamid v. Price Waterhouse*,<sup>92</sup> the Ninth Circuit wrongly held that the hopeless class of depositors had no standing to bring a claim at all. Recognizing that its complaint alleged a wide variety of wrongs that resulted in the class of depositors not obtaining the return of its deposits, including misrepresentations about the solvency of BCCI that "enabled it to attract deposits which it otherwise would have been unable to obtain,"<sup>93</sup> the Ninth Circuit, nevertheless, classified the depositors as "creditors of BCCI,"<sup>94</sup> and framed the issue:

[The depositors], allegedly loaned money to BCCI which, because of various wrongs by defendants, it was unable to pay back. To the extent that the alleged wrongs reduced the ability of the bank to pay its debts, or caused it to be in business for a longer time than it should have been so that it could continue to borrow money from depositors fooled about its true condition, the wrongs would have the practical consequence of harming the depositors.

The question is whether persons whose injury is in this manner indirect have standing to assert a RICO claim. BCCI, the allegedly dishonest and defaulting debtor, is not a defendant. Instead, other people and firms, who allegedly contributed to BCCI's condition, but who themselves had no direct relationship to the appellants and caused them no direct harm, are the defendants. Suppose the "BCCI pirates" looted the bank just as the complaint says. Can a depositor in a bank sue a bank robber?<sup>95</sup>

Relying on *In re Sunrise Securities Litigation*<sup>96</sup>, the Ninth Circuit denied the depositors standing, that is, it held that their claim was "derivative."<sup>97</sup> Noting

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90. 133 U.S. 1, 19-20 (1890).

91. 819 F.2d at 448-49. See also Mark A. Jankowski, *supra* note 88 at 177.

92. 51 F.3d 1411 (9th Cir. 1995) (Kleinfeld, J.).

93. *Id.* at 1414.

94. *Id.* at 1419 (citing *Bank of Marin v. England*, 385 U.S. 99, 101 (1966)).

95. *Id.*

96. 916 F.2d 874, 880 (3rd Cir. 1990) (holding depositors, like shareholders of corporation to generally lack standing to sue for injury to looted bank).

97. *Id.* (citing *Adate v. Kagan*, 599 F.2d 1111, 1117 (2nd Cir. 1979) (holding that wrongdoing by bank officers may only be remedied by the bank or its receiver, not depositors)).

*United States v. BCCI Holding (Luxembourg) S.A.*,<sup>98</sup> the court observed: “[the depositors’] attempt to jump in line ahead of other creditors was rebuffed in that case, and it is rebuffed here.”<sup>99</sup> The Ninth Circuit’s decision, too, was plainly wrong. First, the court was mistaken in its implicit assumption that possible claims of liquidators in the overseas liquidation of BCCI against the “BCCI pirates” were co-terminus with those of the class of defrauded depositors. RICO authorized, for example, the recovery of consequential damages.<sup>100</sup> A claim for those damages belongs exclusively to the depositors.<sup>101</sup> In addition, the liquidators may well be precluded from any recovery against those who looted the banks, since the “pirates” were insiders.<sup>102</sup> Conflating the depositor’s suit against the “pirates” with that of the bank and denying standing to the depositors may well have the perverse outcome of denying recovery against wrongdoers to any person, hardly the result envisioned by the Supreme Court, when it recognized the concept of direct/indirect injury in *Holmes v. Securities Investor Protection Corp.*<sup>103</sup> Second, the court commented negatively on the failure of the depositors to sue BCCI.<sup>104</sup> The depositors could not, however, as the bank was in bankruptcy.<sup>105</sup>

Third, the court mischaracterized the depositors’ claim as “derivative”.<sup>106</sup> In fact, the depositors’ complaint carefully articulated the depositor’s theory that they were the *direct* victims of a fraud that targeted, not only the bank, but them. They were, in fact, fraudulently induced to deposit their money in BCCI in reliance on repeated false and misleading representations made to them. In holding that the defrauded depositors’ injuries were only “derivative” of injuries sustained by BCCI, the court’s opinion conflicts with decades of Supreme Court and Ninth Circuit precedent recognizing that defrauded depositors possess standing to sue in their own right.<sup>107</sup>

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98. *United States v. BCCI Holding*, 46 F.3d 1185 (D.C. Cir. 1995).

99. 51 F.3d at 1421.

100. *James v. Heinke*, 778 F.2d 200, 207 (5th Cir. 1985).

101. *Caplin v. Maine Midland Grace Trust Co.*, 406 U.S. 416, 431-32, 434 (1972).

102. See, e.g., *O’Mellveny & Meyer v. F.D.I.C.*, 114 S. Ct. 2048, 2053 (1994) (stating that imputation of default defense may preclude recovery); *ICC v. Transcor Lines*, 981 F.2d 402, 411-12 (9th Cir. 1992) (holding trustee in bankruptcy precluded from seeking damages because of debtor’s own unlawful conduct).

103. *Holmes v. Securities Investor Protection Corp.*, 112 S. Ct. 1311, 1320-21 (1992) (“[T]hose directly injured, the broker-dealers, [can] be counted on to bring suit for the law’s vindication. . . . SIPC must wait on the outcome of the trustee’s suit.”).

104. *BCCI*, 51 F.3d at 1419.

105. Cf. *U.S. Industries, Inc. v. Touche Ross & Co.*, 854 F.2d 1234, 1251 (10th Cir. 1988).

106. *Id.* at 880.

107. See, e.g., *Caplin* 406 U.S. at 431-32, 434 (holding that trustee of an insolvent entity does not have standing to sue on behalf of the victims of its fraud and cannot preempt the victims’ lawsuit; victims alone have standing to pursue their own class action fraud claims); *Chesbrough v. Woodworth*, 244 U.S. 72, 76 (1917) (finding “no reversible error” in a lower court ruling that a shareholder could maintain a direct action under the National Bank Act against bank officers who knowingly authorized a false and misleading report upon which the shareholder relied in purchasing stock); *Williams v. California 1st Bank*, 859 F.2d 664, 667 (9th Cir. 1988) (holding that a trustee lacked standing to bring suit against a bank on behalf of the debtor’s creditors and recognizing that the victims of the fraud—the real parties in interest—were entitled to pursue their own claims);

One searches the court's opinion in vain for citation to these and other controlling precedents. While the general rule is, of course, that a person does not possess standing to complain about an injury to another when he is, in fact, a target of a fraudulent scheme, he possesses standing to sue under § 1964(c) of RICO.<sup>108</sup> If persons are "intended victims of the scheme," "no question" may be properly raised of their RICO standing.<sup>109</sup> As the Second Circuit held in *GICC Capital Corp.*, which the Ninth Circuit ignored, "[w]hen a corporation fraudulently is caused to issue debt and stripped of its assets in a manner that obviously will leave the creditors unpaid, *those creditors have standing*. Their injury is 'reasonably foreseeable or anticipated as a natural consequence.'" <sup>110</sup>

On the other hand, the court relied on the Second Circuit's decision in *Manson v. Stacescu*,<sup>111</sup> to support the proposition that BCCI's depositors, as "[c]reditors of a bankrupt corporation," lack standing under RICO.<sup>112</sup> The Ninth Circuit, however, ignored that *Manson* was found to be unpersuasive by the Second Circuit on different facts. In *GICC Capital*, the Second Circuit refused to follow *Manson*, noting that its unusual facts were distinguishable and that its holding was contrary to other RICO standing and causation decisions from that circuit.<sup>113</sup> The court's reliance on *In re Sunrise Sec. Litig.*<sup>114</sup> was mistaken. In *Sunrise*, the FDIC, which intervened in a class action brought by five depositors, argued that the depositors' claims were, in essence, allegations of mismanagement by the officers and directors.

Although the allegations are cast in terms of defendants' misrepresentation of

*Rochelle v. Marine Midland Grace Trust Co.*, 535 F.2d 523, 527 (9th Cir. 1976) (same); *see also* *Harmsen v. Smith*, 542 F.2d 496, 502 (9th Cir. 1976) (relying on *Chesbrough* and holding allegations by shareholders that they had relied to their detriment upon false reports issued by bank officers sufficient to state a claim of direct injury under the National Bank Act, even though the only injury claimed—diminution in share value—was sustained by all shareholders alike).

108. *Holmes*, 112 S. Ct. at 1320 & n.19 (1992) (RICO brokerage/customer); *GICC Capital Corp. v. Technology Fin. Group*, 30 F.3d 289, 293 (2d Cir. 1994) (RICO: debtor/creditor); *Ceribelli v. Elghanayan*, 990 F.2d 62, 64-65 (2d Cir. 1993) (RICO: cooperative/owner); *University of Maryland v. Peat Marwick Main & Co.*, 923 F.2d 265, 273-74 (3d Cir. 1991) (insurer/policyholder); *In re EDC*, 930 F.2d 1275, 1279 (7th Cir. 1991) (debtor/creditor); *Ashland Oil Inc. v. Arnett*, 875 F.2d 1271, 1279-80 (7th Cir. 1989) (RICO debtor/creditor); *Ocean Energy II, Inc.*, 868 F.2d at 743-46 (corporation/insurer).

109. *Sutliff, Inc. v. Donovan Cos.* 727 F.2d 648, 654 (7th Cir. 1984) (Posner, J.).

110. 30 F.3d at 293 (emphasis added) (citation omitted).

111. 11 F.3d 1127, 1130 (2d Cir. 1993), *cert. denied*, 115 S. Ct. 292 (1994).

112. *BCCI*, 51 F.3d at 1420.

113. 30 F.3d at 293 (citing *Ceribelli*, 990 F.2d at 63-64 (granting standing to shareholders in a corporation who bought stock from a cooperative's sponsor-promoters in reliance on the latter's misrepresentations "stated a claim of direct injury . . . whether or not the [ir] corporations may also bring an action")); *Stochastic Decisions, Inc. v. DiDomenico*, 995 F.2d 1158, 1171 (2d Cir.) (same), *cert. denied*, 114 S. Ct. 385 (1993); *Standardbred Owners Ass'n v. Roosevelt Raceway Assocs., L.P.*, 985 F.2d 102, 104-05 (2d Cir. 1993) (same); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1101 (2d Cir. 1988) (allowing creditors of a bankrupt corporation, who sought recovery under RICO for acts of bankruptcy fraud and bribery that concealed a corporate asset during reorganization, to pursue their claim notwithstanding the possibility that the bankrupt corporation "might also have suffered an identical injury for which it has a similar right of recovery"), *cert. denied*, 490 U.S. 1007 (1989).

114. 916 F.2d 874 (3d Cir. 1990).



and failure to disclose information, we believe that under the distinct circumstances of this case, such allegations do not state a claim of direct injury founded on fraud. . . . The asserted injury emanated from mismanagement, not fraud. . . . [T]he depositors' loss cannot be separated from the injury suffered by the institutions and all other depositors, and the damages recoverable are assets of the institution's.<sup>115</sup>

In relying on *Sunrise*, the Ninth Circuit ignored the crucial difference that although the Third Circuit held that the depositors' claims were "derivative", that is, owned by the FDIC, it distinguished the "distinct circumstances" of that case from one where officers misrepresented the bank's financial condition directly to depositors—the scheme to defraud alleged by BCCI's depositors—stating that "a nonderivative action may be maintained where the injury was sustained by a depositor as an individual, independent of any injury to the bank or other depositors,"<sup>116</sup> and emphasizing that "in some circumstances, depositors may bring individual RICO actions against officers, directors, and others who fraudulently obtain deposits by misrepresenting the financial condition of an institution."<sup>117</sup> In such cases, the Third Circuit explained, "[t]o the extent that depositors assert individual, nonderivative fraud claims against the officers, directors, auditors, or attorneys of insolvent financial institutions, they may proceed on equal footing with FDIC against these defendants."<sup>118</sup>

For example, in *Howard v. Haddad*,<sup>119</sup> which the Ninth Circuit similarly ignored, a shareholder brought claims against the officers of a failed bank alleging that defendants induced him to purchase the bank's stock without disclosing its precarious financial situation.<sup>120</sup> The essence of Howard's claim was similar to that leveled by the depositors in BCCI: the bank's directors misrepresented the bank's financial condition in an effort to secure badly needed capital from investors.<sup>121</sup> The Fourth Circuit determined that Howard's claims were not "derivative," rejecting the FDIC's claim that it was entitled to priority,<sup>122</sup> and reasoning that Howard's claims were not based on mismanagement but, rather, misrepresentations. His standing to sue was established:

What is essential is [Howard's] allegation that the defendants knew of the lack of value, yet fraudulently represented to Howard that the bank was in fine shape . . . . The mere fact that Howard and the FDIC are pursuing the same source of assets does not transform Howard's action to a derivative one.<sup>123</sup>

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115. 916 F.2d at 883.

116. *Id.* at 884 (footnote omitted).

117. *Id.* at 887 (emphasis added).

118. 916 F.2d at 889.

119. 916 F.2d 167 (4th Cir. 1990).

120. *Id.* at 168.

121. *Id.* at 168-69.

122. *Id.* at 169.

123. *Id.* at 170; accord *Greenfield v. Shuck*, 867 F. Supp. 62, 67 (D. Mass. 1994) ("The Greenfield plaintiffs

The Third Circuit's own decision in *Hayes v. Gross*,<sup>124</sup> is also illustrative. In *Hayes*, the court held that stock purchasers in a savings association (Bell) who alleged that its officers and directors had misrepresented its financial condition, causing the purchasers to pay an inflated price for its stock, could be asserted directly against the insiders. The Third Circuit observed:

Allowing plaintiff to pursue this claim will neither prejudice the corporation and its other stockholders nor permit a double recovery for the same injury. If Bell has claims against its officers and directors arising from their mismanagement, the RTC is free to pursue those claims for the ultimate benefit of the creditors' and stockholders of Bell. Assuming solvency on the part of the defendants, . . . we see no conflict between plaintiff's interest and those of the creditors and other stockholders. Assuming insolvency on the part of the defendants, a conflict between plaintiff and Bell, as creditors of the defendants, may arise, but the RTC has advanced no persuasive reason why, in such circumstances, plaintiff and Bell should not be treated as any other creditors competing for a limited pool of resources.<sup>125</sup>

Like *Chawla*, *Hamid* was wrongly decided; it, too, worked a grave injustice on the class of defrauded depositors.

9. *Conclusion*: In another context, Judge Kleinfeld, the author of the *Chawla* opinion, rightly decried the politicization of the law schools, saying:

In my experience, the process of dispensing justice—the true business of the courts—is harmed in two ways by the politicization of the law schools. First, the education of law clerks and judges suffers. Second, we judges, like most people, are affected by our audience. Politicization of the universities reduces the quality of the responses of the audience and thereby impairs the incentives for good legal craftsmanship.<sup>126</sup>

That law school education is politicized cannot be seriously questioned, most particularly by members of the critical legal studies movement (C.L.S.).<sup>127</sup> The C.L.S. movement is an outgrowth of the legal realism movement that was “the dominant influence on American Legal Thought for most of the 1920's and 1930's. The Realist movement began as a revolt against the tenets of Classical Legal Thought, which portrayed judicial decision as the outcome of reasoning from a

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have alleged that numerous personal assurances were given to induce them to withdraw funds from deposit accounts to purchase the Subordinated Capital Notes. The injuries suffered by these plaintiffs are sufficiently distinct from any injury to the corporation as a whole.”).

124. 982 F.2d 104 (3d Cir. 1992).

125. 982 F.2d at 108-09.

126. Andrew J. Kleinfeld, *Politicization: From The Law Schools to The Courts*, ACADEMIC QUESTIONS 9 (Winter 1993-94).

127. See generally MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); DAVID KAIRYS (ED.) THE POLITICS OF LAW (2nd ed. 1990).

finite set of determinate principles.”<sup>128</sup> M.D.A. Freeman observes:

Like realism, with which it is often compared [C.L.S.] . . . is skeptical of orthodoxy. It builds upon insights from social and critical philosophy, literary theory and elsewhere. It draws on the radical political culture of the 1960's generation. . . . In one sense it is a continuation of the Realists' project, but its objectives are much wider. The Realists were firmly within the camp of liberalism: the C.L.S. movement is more radical an attempt to escape the “crippling choice” between liberalism and Marxism. Like the Realists C.L.S. rejects formalism (but does any serious legal thinker today accept the notion that disputes can be resolved by the neutral application of objective rules?), but the Realists saw legal reasoning as autonomous or distinct and C.L.S. scholars certainly reject the enterprise of presenting a value-free model of law. A major difference between critical and orthodox (including for these purposes Realist) legal thought is then that, though the latter rejects formalism, it maintains the existence of a viable distinction between legal reasoning and political debate. Critical legal thought does not countenance this distinction. Critical legal thinkers believe there is no distinctive mode of legal reasoning. Law is politics. It does not have an existence outside of ideological battles within society.<sup>129</sup>

While neither the law professor nor the litigator who are the authors of these reflections is a member of the CLS movement, each finds deeply troubling that the results in *Chawla* and *Humid* bear so little relation to well-pled facts and well-established precedent. When the government itself seizes \$550 worth of assets, in contravention of its bankruptcy priority, largely composed of defrauded depositors' funds, under a statute that enjoins “making due provision for the rights of any innocent persons,”<sup>130</sup> and its courts sanction the seizure of the assets by the government and preclude suit under the statute against, not only the government to regain the defrauded assets, but those who “contributed” to the fraud by the convicted bank in violation of the statute,<sup>131</sup> to maintain faith in a

craft [that is supposed to] consist of determining which general [legal] propositions apply, applying them in ways that make some practical and logical sense, and explaining [judicial]. . . decisions in print so that other people can predict what courts will think the law is, conform their conduct to it, avoid burdensome and unpleasant entanglements with the law, and be protected by the law from predators<sup>132</sup>

is difficult. Not only judges, but also professors and litigators, are “alienated” from their “work” when they “do not feel” that “justice” is done.<sup>133</sup>

128. Note, ‘Round and ‘Round the Bramble Bush’s From Legal Realism to Critical Legal Scholarship, 95 HARV. L. REV. 1669, 1670 (1982).

129. M.D.A. FREEMAN, LLOYD’S INTRODUCTION TO JURISPRUDENCE 935-36 (6th ed. 1994) (footnotes omitted).

130. 18 U.S.C. § 1963(g).

131. 51 F.3d at 1419.

132. Kleinfeld, *supra* note 126, at 9.

133. *Id.* at 11.

## APPENDIX B (DEFAUD)

1. *Mail Fraud*: First enacted in 1872, the mail fraud statute,<sup>1</sup> is the progenitor of the federal fraud statutes codified in Title 18.<sup>2</sup> Similar fraud provisions also appear in other Titles of the United States Code.<sup>3</sup> Currently, § 1343 prohibits “any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses” that uses the mails or, since September 13, 1994, the seventh major enlargement of the statute, any “private or commercial interstate carrier.”<sup>4</sup> Pub. L. 100-690,<sup>5</sup> the sixth major revision of the statute, set aside the Supreme Court’s decision in *McNally v. United States*.<sup>6</sup>

1. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323 (codified at, 18 U.S.C. § 1341 (1994)).

2. See, e.g., 18 U.S.C. §§ 1343 (wire fraud); 1344 (bank fraud); 2314 (travel fraud); see also 18 U.S.C. § 371. “There is no basis [however,] for concluding that the term ‘defraud’ means something different in § 1341 (first enacted in 1872) than what it means in § 371 (first enacted in 1867).” *McNally v. United States*, 483 U.S. 350, 369 (1987) (Stevens, J. in dissent). In fact, the phrase appears in up to 500 federal statutes as well as 50 sections of Title 18. *Mail fraud: Hearings on H.R. 3089 and H.R. 3050 Before the Subcomm. on Crim. Justice of the House Judiciary Comm.*, 100th Cong. 2nd Sess. 17 (1988) (Mail Fraud Hearings) (testimony of Acting Assistant Attorney General John C. Keeney).

3. See, e.g., 15 U.S.C. §§ 78; (b), 78 ff(a) (criminal securities fraud).

4. Pub. L. No. 103-322, 108 Stat. 2147 (1994). See *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 190 (1948) (“[These statutes] have been regularly enforced by the executive officers and the courts for more than half a century. They are now part and parcel of our governmental fabric.”); Jed S. Rakoff, *The Federal Mail Fraud Statute* (Part I), 18 DUQ. L. REV. 771, 772 (1980) (“During the past century, both Congress and the Supreme Court have repeatedly placed their stamp of approval on expansive use of the mail fraud statute. Indeed, each of the five legislative revisions of the statute has served to enlarge its coverage.”).

5. 102 Stat. 4508 (1988) (codified at 18 U.S.C. § 1346) (defining “scheme to defraud” to include a scheme or artifice to deprive another of the intangible right of honest services”).

6. 483 U.S. 350 (1987) (§ 1341 does not include scheme to deprive another of an intangible right). Generally, the circuit courts are taking § 1346 at face value: pre-*McNally* jurisprudence is to be restored. See, e.g., *United States v. Castro*, 89 F.3d 1443, 1455-56 (11th Cir. 1996) (RICO mail fraud), in which the court observed:

Appellants also suggest that Congress’s enactment of section 1346 restricts section 1341’s protection to nongovernmental victims. In 1988, Congress enacted section 1346 of the mail fraud statute to state an offense for the deprivation of intangible rights such as “honest services,” thus overturning the Supreme Court’s decision in *McNally v. United States* . . . Appellants assert that sections 1341 and 1346 read together seek to punish “whoever having devised or intended to devise any scheme or artifice to deprive ‘another’ of the intangible right of honest services . . . places in any post office or authorized depository for mail matter . . .” Appellants argue that the term “another” cannot encompass a state. We disagree.

Neither the plain language of section 1346 nor its legislative history supports the limitation appellants urge. We find it instructive to note that prior to section 1346’s enactment, similar questions arose regarding the reach of section 1341’s protection . . .

Indeed, other cases decided based upon section 1341 violations, prior to the clarifying amendment of section 1346, support our finding that the mail fraud statute does not protect governmental entities such as a state . . .

We can discern no reason to read sections 1341 and 1346 as appellants suggest to exclude states, and presumably, all governmental entities from the mail fraud statute’s protection. We believe that such a result would belie a clear congressional intent to construe the mail fraud statute broadly.” (citations omitted).

*Accord* *United States v. Sawyer*, 85 F.3d 713, 723-25 (1st Cir. 1993) (mail and wire fraud; violations of state gratuity statute; honest services, fraud within statutes; even so, fraud must result in deprivation of services, not

Because these statutes "share the same language," they are read together.<sup>7</sup> Nevertheless, the mail fraud statute is different from its cognate statutes. For example, bank fraud requires a federally insured bank.<sup>8</sup> Wire fraud requires an interstate or foreign communication.<sup>9</sup> Securities fraud requires not only a security, but also interstate commerce, the mails, or a national securities exchange.<sup>10</sup> Travel fraud, too, requires the interstate or foreign movement of the victim or of property worth \$5,000.<sup>11</sup>

2. *Scheme to Defraud*: The phrase "scheme to defraud" is not circumscribed by common law-type limitations.<sup>12</sup> The language was drafted in a "sufficiently

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mere personal gain; if not, evidence of intent to defraud must be presented separate from schedule); *United States v. Brumley*, 79 F.3d 1430 (5th Cir. 1996) is a conspicuous exception, an exception for which little that is charitable may be said. In *Brumley*, the Fifth Circuit reversed a mail and wire fraud conviction of Michael Brumley, the regional associate director of the Texas Industrial Accident Board, who took \$40,000 in loans from local attorneys. Finding that "another" in § 1346 was ambiguous, that is, its referent was not apparent ("whoever" or another indefinite reference), the court turned to legislative history, which it found "unpersuasive" of an intent to have § 1346 encompass public corruption. *Id.* at 1437. *McNally*, the court held, required congress "to speak more clearly." *Id.* at 1434. That requirement, the court felt, was not met. *Id.* 1437. Unfortunately for the Court's analysis, it woefully misread the legislative history of § 1346. The text of § 1346 originated in the Fraud Amendments Act of 1987 (H.R. 3089), which was introduced by Congressman John Conyers on August 4, 1987. 133 Cong. Rec. E3240-02 (August 4, 1987). Congressman Conyers discussed at length the scope of the bill, which in its key language ("defrauding another") reflects the language of § 1346. Congressman Conyers focused in his introductory statement on "white collar crime, including political corruption." Companion legislation was introduced in the Senate by Senator Arlen Specter. 133 Cong. Rec. S16742-03 (November 30, 1987) (S. 1898). Senator Specter, too, fully discussed the purpose of the bill. The research of the Court found neither bill nor the introductory statements hearings chaired by Congressman Conyers, were held on H.R. 3089 in the House. MAIL FRAUD, HEARINGS BEFORE THE SUBCOMMITTEE ON CRIMINAL JUSTICE BY THE HOUSE JUDICIARY COMMITTEE, 100th Cong. 2nd Sess. (May 22 1988) (Serial No. 145). Testimony was taken from a wide variety of witnesses. All aspects of the proposed legislation was considered, including its application to public and private corruption and narrowing its scope to only amend mail and wire fraud rather than defining "scheme to defraud" throughout the entire United States code, as did the bill's original text. The research of the court did not find the hearings. Earlier, too, Congressman Conyers discussed at length the rationale for federal involvement in state and local corruption on the House floor. 133 Cong. Rec. H. 10656-01 (November 19, 1987) (including Const. Art. III § 4 (republican form of government)). The research of the Court did not find this statement. When the text of § 1346 was added to the drug bill, Congressman Conyers explained its purpose. 134 Cong. Rec. H. 11, 108-01 (Oct. 21, 1988). The Court's research found this statement, but when it quoted it, the Court inexplicably ignored Congressman Conyers' reference to his May 22, 1988 hearings. In short, *Brumley's* research and conclusion are themselves unpersuasive. "[I]t is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it. . . ." *Johnson v. United States*, 163 F. 30, 32 (1st Cir. 1908) (Holmes, J.). A statute "may be as effectively annulled by misconstruction as by avowedly setting it aside." *American Express Co. v. South Dakota ex. rel. Caldwell*, 244 U.S. 617, 628 (1917) (Brandeis, J.). Such construction . . . is not interpretation but perversion." *United States v. Pulaski Co.*, 243 U.S. 37, 106 (1917) (Holmes, J.).

7. *Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987).

8. *United States v. Branch*, 46 F.3d 440, 441 n.1 (5th Cir. 1995).

9. *United States v. Griffith*, 17 F.3d 865, 874 (6th Cir. 1994); *United States v. Keller*, 14 F.3d 1051, 1056 (5th Cir. 1994). Mail Fraud applies even if the mailing is intrastate. *United States v. Elliot*, 89 F.3d 1360, 1363-64 (8th Cir. 1996).

10. *United States v. Ruggiero*, 56 F.3d 647, 655 n.5 (5th Cir.), *cert. denied*, 116 S. Ct. 486 (1995); *Smith v. Ayres*, 845 F.2d 1360, 1366 (5th Cir. 1988), *cert. denied*, 113 S. Ct. 2342 (1993).

11. 18 U.S.C. § 2314.

12. *Durland v. United States*, 161 U.S. 306, 312-14 (1896); *United States v. Massey*, 48 F.3d 1560, 1566 (10th Cir.) ("A scheme refers to the overall design to defraud one or many by means of a common plan or technique."), *cert. denied*, 115 S. Ct. 2628 (1995).

general" fashion to apply to a broad range of schemes.<sup>13</sup> Though Rakoff comments that the mail fraud statute "had no obvious precursor,"<sup>14</sup> careful research shows that it is an amalgam of several common law predecessors.

[M]ail fraud is the culmination of a long historical progression. Seen in the light of . . . history, the congressional drafters purposely took elements from older offenses, while purposely leaving other elements out. The victim of larceny, embezzlement, or false pretense had to suffer a property loss. Mail fraud does not require such loss. Common-law cheat required a token . . . [M]ail fraud does not require such a token . . . . The requirements of common-law cheat could be met [without a token] by a conspiracy to defraud. The congressional drafters of mail fraud deliberately substituted the concept of 'scheme.' The drafters also retained the element of 'intent to defraud' required by false pretenses . . . . Accordingly, mail fraud is best seen as a modern form of common-law cheat.<sup>15</sup>

Congress did not intend to codify in the mail fraud statute the concepts reflected in the common law tort of "deceit" or the common law crimes of "larceny by trick" or "obtaining property by false pretenses." Because it did not employ common law terminology, Congress adopted a broader concept.<sup>16</sup> Decisions and treatises of the time refer, for example, to the common law action for misrepresentation, not as "fraud", but as "deceit."<sup>17</sup> In contrast, the term "fraud," when used alone, signified a much broader range of overreaching conduct.<sup>18</sup>

13. *United States v. Maze*, 414 U.S. 395, 399 n.4 (1974) (application to credit cards, a device not in existence in 1872); see *Courthay Chetty Genco* *supra* text note 3, at 365-67 (collecting decisions upholding prosecutions of a wide range of fraudulent schemes). But see *Smith v. Jackson*, 84 F.3d 1213 (9th Cir. 1996) (reformulated copyright infringement claims are not wire or mail fraud); *United States v. Boots*, 80 F.3d 580, 586 (1st Cir. 1996) (wire fraud does not include scheme to defraud foreign government); *United States v. Mueller*, 74 F.3d 1152, 1158-60 (11th Cir. 1996) (bank fraud does not include false letters in litigation). The result in *Smith* was set aside by the "Anti-Counterfeiting Consumer Protection Act of 1996," 100 Stat. 1386 (Section 3 amends 18 U.S.C. § 1961 to add 18 U.S.C. §§ 2318 (trafficking in counterfeit labels), 2319 (criminal infringement of copyright), 2319A (unauthorized fixation of recordings) and 2320 (counterfeit marks)).

14. Rakoff, *supra* APPENDIX B note 4, at 779.

15. *Courtney Chetty Genco*, *supra* MAIN TEXT note 3, at 355-56; see also *Russello v. United States*, 464 U.S. 16, 23 (1983) (omission of language presumed purposeful).

16. See, e.g., *United States v. Turley*, 352 U.S. 407, 411-12 (1957) ("steal" not limited to "larceny"). See, *infra*, APPENDIX H, note [insert]. See generally 1 JOEL P. BISHOP, COMMENTARIES ON THE CRIMINAL LAW, 347-361 (photo. reprint 1986) (7th ed. 1882) (setting forth technical requirements for property crimes such as embezzlement and false pretenses); THOMAS M. COOLEY, THE LAW OF TORTS, 474-78 (1st ed. 1880) (setting forth requirements for common law action for deceit); LAFAYETTE & SCOTT, *supra* note 147, at 700-801 (same); Arthur R. Pearce, *Theft by False Promises*, 101 U. PA. L. REV. 967 (1953) (same). See also 1 THOMAS STREET, THE FOUNDATIONS OF LEGAL LIABILITY, 375 (1906) (history of common-law writ of deceit *breve de deceptione*, which existed as early as 1201 A.D.).

17. JOEL BISHOP, COMMENTARIES ON THE NON-CONTRACT LAW 132-44 (1889); COOLEY, *supra* APPENDIX B note 16, at 474-75; 1 E. JAGGARD, HAND-BOOK OF THE LAW OF TORTS 558-602 (1895); FREDERICK POLLOCK, A TREATISE ON THE LAW OF TORTS 348-88 (1894).

18. MELVILLE BIGELOW, THE LAW OF FRAUD 3-4, 190-92 (1877); COOLEY, *supra* APPENDIX B note 16, at 473-74, 508-30; 2 FRANCIS HILLIARD, THE LAW OF TORTS 74 (1874); see also WILLIAM ANDERSON, A DICTIONARY OF LAW 474-78 (1889); 1 BOUVIER'S LAW DICTIONARY 530 (1897) ("[t]o defraud is to withhold from another that which is justly due him, or to deprive him of a right by deception or artifice").

The term "scheme to defraud" includes promises made with an intent not to perform.<sup>19</sup> It is not limited to misrepresentation. It includes, for example, the misappropriation of confidential information, that is, embezzlement.<sup>20</sup> "[I]t is impossible for a person to embezzle the money of another without committing a fraud upon him."<sup>21</sup> "A comprehensive definition of 'scheme or artifice to defraud' need not be undertaken. The phrase is a broad one and extends to a great variety of transactions."<sup>22</sup> But its focus is on "'wronging one in his property rights by dishonest methods or schemes' and [it] 'usually signif[ies] the deprivation of something of value by trick, deceit, chicane or overreaching.'"<sup>23</sup> In fact, the only substantive area carved out of "scheme to defraud" by the Supreme Court is violence.<sup>24</sup>

Nevertheless, the breadth of the concept must not be extended beyond congressional purpose.<sup>25</sup> The scope of the modern understanding of "scheme to defraud" is best articulated by *Gregory v. United States*<sup>26</sup> as a "non-technical" standard. Broadly, it reflects "moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society."<sup>27</sup> While this standard is generally accepted, it also meets with sharp criticism.<sup>28</sup> Taking his cue from Professor John Coffee,<sup>29</sup> then Judge (now Chief Judge) Posner first sharply

19. *United States v. Comyns*, 248 U.S. 349, 353 (1919).

20. *Carpenter*, 484 U.S. at 27; *Formax, Inc. v. Hostert*, 841 F.2d 388, 390 (Fed. Cir. 1988).

21. *Grin v. Shine*, 187 U.S. 181, 189 (1902).

22. *Fasulo v. United States*, 272 U.S. 620, 628 (1926).

23. *Carpenter*, 484 U.S. at 27 (quoting *McNally*, 483 U.S. at 358 (quoting *Hammersmidt v. United States*, 265 U.S. 182, 188 (1924))); *Fasulo*, 272 U.S. at 627.

24. *Fasulo*, 272 U.S. at 628; see also *United States v. Coyle*, 943 F.2d 424, 427 (4th Cir. 1991) (manufacture and advertisement of device to cheat cable companies is "scheme to defraud," even though that concept may be broader than common law fraud); *United States v. Cherif*, 943 F.2d 692, 696-97 (7th Cir. 1991) (tricking bank into allowing former employee to continue to use key card that permitted access to confidential information that, in turn, permitted insider trading is a "scheme to defraud"), *cert. denied*, 503 U.S. 961 (1992). But see *United States v. Mueller*, 74 F.3d 1152, 1159 (11th Cir. 1996) (attorney false statements in litigation not bank fraud). See, e.g., *United States v. Stites*, 56 F.3d 1020, 1022 (9th Cir. 1995) (breach of professional responsibility "more heinous" fraud); *Napoli v. United States*, 45 F.3d 680, 683 (2d Cir. 1995); *Crowe v. Smith*, 848 F. Supp. 1258, 1264 (W.D. La. 1994).

25. *United States v. Bohonus*, 628 F.2d 1167, 1170 (9th Cir.), *cert. denied*, 447 U.S. 928 (1980).

26. 253 F.2d 104, 109 (5th Cir. 1958).

27. *Id.*

28. Compare *id.*, and *United States v. Bishop*, 825 F.2d 1278, 1280 (8th Cir. 1987) (*Gregory* standard followed), and *United States v. Hathaway*, 798 F.2d 902, 908 (6th Cir. 1986) (same), and *United States v. Conner*, 752 F.2d 566, 572 (11th Cir.) (RICO mail fraud; *Gregory* standard followed), *cert. denied*, 474 U.S. 821 (1985), and *United States v. Von Barta*, 635 F.2d 999, 1005 (2d Cir. 1980) (same), *cert. denied*, 450 U.S. 998 (1981) *Bohonus*, 628 F.2d at 1171 (same), and *United States v. Mandel*, 591 F.2d 1347, 1360-61 (4th Cir.) (en banc) (same), *vacated on other grounds*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980), and *United States v. Serlin*, 538 F.2d 737, 744 (7th Cir. 1976) (same), with *In re EDC, Inc.*, 930 F.2d 1275, 1281 (7th Cir. 1991) (criticizing the *Gregory* standard); *United States v. Holzer*, 816 F.2d 304, 309 (7th Cir.) (same), *vacated on other grounds*, 484 U.S. 807 (1987), *cert. denied*, 486 U.S. 1035 (1988), and *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1402 (9th Cir. 1986) (Kennedy, J. concurring) (same), and *United States v. Dial*, 757 F.2d 163, 170 (7th Cir.) (same), *cert. denied*, 474 U.S. 838 (1985).

29. John C. Coffee, Jr., *Some Reflections on The Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethic*, 19 AM. L. REV. 117 (1981).

criticized the *Gregory* standard in *United States v. Dial*,<sup>30</sup> objected in *United States v. Holzer*<sup>31</sup> that the standard would “put federal judges in the business of creating . . . common law crimes, that is, crimes not defined by statute,” and then concluded in *In re EDC, Inc.*<sup>32</sup> that the Seventh Circuit in *Dial* and *Holzer* “repented” from the *Gregory* standard; the standard should, therefore, he suggested, be “taken with a grain of salt,” because “[r]ead literally it would put federal judges in the business of creating new crimes; federal criminal law would be the nation’s moral vanguard.” Nevertheless, he did not purport to overrule it—as he could not without having the circuit go en banc or seek approval of the new rule by the circuit.<sup>33</sup> Accordingly, *Gregory*, as adopted in *Serlin*, remains the standard even in the Seventh Circuit, despite Judge Posner’s criticisms. In *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*,<sup>34</sup> then Judge (now Justice) Kennedy expressed similar concern with the scope of *Gregory*—at least outside of the area of criminal prosecutions—because it was not circumscribed by prosecutive discretion. Nevertheless, *Gregory* remains the law of the Ninth Circuit, too, until it is reconsidered en banc or superseded by an intervening Supreme Court decision.<sup>35</sup>

Justice Kennedy’s and Chief Judge Posner’s solicitude for the hapless businessperson caught unaware in the amorphous net of “scheme to defraud” is touching, but misplaced. Since the Supreme Court’s decision in 1896 in *Durland*, mail fraud requires an “intent to defraud,” and good faith is an absolute defense to a charge of mail fraud. Accordingly, the state of mind requirement of mail fraud mitigates, if it does not entirely eliminate, defensible objections to a criminal prohibition drafted as an open-textured “standard,” rather than a “narrow rule.”<sup>36</sup>

30. 757 F.2d 163, 170 (7th Cir.), *cert. denied*, 474 U.S. 838 (1985).

31. 816 F.2d at 309.

32. 930 F.2d 1275, 1281 (7th Cir. 1991). *See also* *Emery v. American General Financial Inc.*, 71 F.3d 1343, 1346 (7th Cir. 1995) (Posner, C.J.) (citing *Dial*). *Accord* *United States v. Brown*, 79 F.3d 1550, 1556 (11th Cir. 1996) (*Gregory* standard does not have the force of “binding precedent”); *United States v. Mueller*, 74 F.3d 1152, 1159 (11th Cir. 1996) (*Goldblatt* standard not persuasive).

33. 8TH CIR. R. 40(f).

34. 806 F.2d 1393, 1402 (9th Cir. 1986).

35. *See, e.g., Adamson v. Lewis*, 955 F.2d 614, 620 (9th Cir.), *cert. denied*, 503 U.S. 1213 (1992) (panels are bound by decisions of prior panels or *en banc* decisions unless they are clearly inconsistent with subsequent Supreme Court decisions).

36. The Coffee, Posner, and Kennedy objection to the scope of “scheme to defraud” is, of course, the classic critique of the criminal law by “the liberal position” of the 18th century. LEON RADZINOWICZ, *IDEOLOGY AND CRIME* 9-14 (1966). What that position gives insufficient attention to is the distinction between a “standard” and a “rule,” and the legitimate, although limited, function a “standard” may have in the administration of justice. ROSCOE POUND, *CRIMINAL JUSTICE IN AMERICA* 30-31 (1950); *Nash v. United States*, 229 U.S. 373, 377 (1913) (“antitrust;” restraint of trade) (Holmes, J.) (“[T]he law is full of instances where a man’s fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree.”). *See generally*, *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 501 (1982) (“a scienter requirement may mitigate a law’s vagueness”); *United States v. United States Gypsum Co.*, 438 U.S. 422, 440 (1978) (state of mind read into anti-trust statutes to mitigate their open-textured character); *United States v. Ragen*, 314 U.S. 513, 523-24 (1942) (defense of good faith will defeat claim of “willful” tax evasion, even when statute requires jury to decide whether defendant made “unreasonable” allowance for salary); *Hygrade Provision Co. v. Sherman*, 266



Unfortunately, litigants and courts often "confus[e] mail fraud with common law fraud."<sup>37</sup> "Scheme to defraud" is not limited to forms of common law deceit, which require misrepresentation or omission where a duty to speak is present, reliance, etc.

Cheating—without misrepresentation—suffices to establish a "scheme to defraud."<sup>38</sup> In short, "[c]ourts have read both the mail fraud . . . and the wire fraud statute[s] . . . as forbidding both schemes to defraud that do not involve false pretenses or representations, and schemes to defraud by means of such false pretenses or representations."<sup>39</sup> The general point is most easily seen by examining the jurisprudence on check kiting under § 1344 (bank fraud), which takes its key language from the mail and wire fraud statutes.<sup>40</sup> In *Williams v. United States*,<sup>41</sup> the Supreme Court held that a check drawn on an account with insufficient funds was not subject to prosecution under § 1014 (false statement to bank) because it was an order (an imperative), not a statement (a declarative); accordingly, it could not be "characterized as 'true' or 'false'." Congress then passed § 1344 that, like the mail fraud statute, contains two clauses, to wit, (1) "scheme to defraud," and (2) "obtaining money by false pretenses." Check kiting schemes may be prosecuted under the first clause, but not the second, because they involve fraud, but not a false statement. When they are based on the second clause, they fail.<sup>42</sup>

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U.S. 497, 501 (1925) (criminal prohibition against mislabelling products as "kosher" or "non-kosher" not void for vagueness because intent to defraud is required; good faith is a defense)); *United States v. Castro*, 89 F.3d 1443, 1455 (11th Cir. 1996) (citing *United States v. Waymer*, 55 F.3d 564, 568 (11th Cir. 1995) (§ 1346's "honest services" requirement not unconstitutionally vague as applied because intent to defraud must be shown)); *United States v. Porcelli*, 865 F.2d 1352, 1358 (2d Cir.) (RICO mail fraud prosecution does not violate due process because of intent to defraud requirement), *cert. denied*, 493 U.S. 810 (1989); *United States v. Margiotta*, 688 F.2d 108, 129 (2d Cir. 1982) (RICO mail fraud; "not unconstitutionally vague because § 1341 contains the requirement that the defendant must have acted . . . with a specific intent to defraud") (citations omitted), *cert. denied*, 461 U.S. 913 (1983).

37. *Armco Indus. Credit Corp. v. SLT Warehouse*, 782 F.2d 475, 481 (5th Cir. 1980) (RICO mail fraud).

38. *United States v. Manzeri*, 69 F.3d 222, 226-27 (8th Cir. 1995) (selling unauthorized satellite unscrambler); *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 991 (8th Cir. 1989) (manipulating contract payments); *Weiss v. United States*, 122 F.2d 675, 681 (5th Cir.), *cert. denied*, 314 U.S. 687 (1941) (contract price raised by fictitious extra charges) ("The law does not define fraud; it needs no definition; it is as old as falsehood and as versable as human integrity."); *Shushan v. United States*, 117 F.2d 110, 115 (5th Cir.) (bribery may serve as a basis for mail fraud; "A scheme to get money unfairly by obtaining and then betraying the confidence of another, or by corrupting one who acts for another . . . would be a scheme to defraud though no lies were told."), *cert. denied*, 313 U.S. 574 (1941).

39. *United States v. Falcone*, 934 F.2d 1528, 1539 n.28 (11th Cir.), *vacated on other grounds*, 939 F.2d 1455 (1991), *reinstated in relevant part*, 960 F.2d 988 (1992) (en banc), *cert. denied*, 113 S. Ct. 292 (1992); *accord Murr Plumbing v. Scherer Bros. Fin. Servs. Co.*, 48 F.3d 1066, 1069 n.6 (8th Cir. 1995) (RICO; mail and wire fraud include frauds both where misrepresentations are made and where they are not made).

40. *See United States v. Blackmon*, 839 F.2d 900, 906 n.5 (2d Cir. 1988).

41. 458 U.S. 279, 284-85 (1982).

42. *See, e.g. United States v. Doherty*, 969 F.2d 425, 428 (7th Cir.) (bank fraud), *cert. denied*, 113 S. Ct. 607 (1992); *United States v. Sayan*, 968 F.2d 55, 61 n.7 (D.C. Cir. 1992) (noting second clause of bank fraud statute requires material misrepresentation); *United States v. Briggs*, 939 F.2d 222, 226 (5th Cir. 1991) (bank fraud), *cert. denied*, 113 S. Ct. 1016 (1993); *United States v. Bonnett*, 877 F.2d 1450, 1456-57 (10th Cir. 1989) (bank fraud; mere insufficient funds check not misrepresentation).

When they are based on the first clause, they succeed.<sup>43</sup> The difference is that "scheme to defraud," unlike "false pretenses," does not require a false statement; the decisions under the mail fraud and wire fraud statutes reflect similar holdings. As Justice Marshall observed in dissent in *Williams*, "[t]he Courts of Appeals have been virtually unanimous in holding that check kiting is subject to federal prosecution under the mail and wire fraud statutes . . . , and the majority apparently does not question these decisions."<sup>44</sup>

3. *State of Mind*: Defendant must act with an intent to defraud.<sup>45</sup> This state of mind requirement may be broken down into two parts:

- (1) intent to deprive another of something, to harm another, or to gain a benefit for oneself; and
- (2) where false statements or omissions are, in fact, involved, at least recklessness as to the truth or falsity of representations or omission made in the course of the scheme.

First, the defendant must intend the result of his scheme; he must intend to deprive another of something of value or to gain a benefit for himself by means of deprivation or gain.<sup>46</sup> "Intent to deceive" is an intent "to deceive persons of

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43. See, e.g., *United States v. Burnett*, 10 F.3d 74, 78 (2d Cir. 1993) (" 'bare' check-kiting schemes fall only under [§ 1344(1)], 'embellished' check-kiting schemes[, e.g., those containing false statements,] may be prosecuted under [§ 1344(2)]"); *Doherty*, 969 F.2d at 428-30 (bank fraud); *United States v. Stone*, 954 F.2d 1187, 1189-91 (6th Cir. 1992) (same); *Sayan*, 968 F.2d at 61 n.7 (same); *United States v. Fontana*, 948 F.2d 796, 802 (1st Cir. 1991) (same); *United States v. Celesia*, 945 F.2d 756, 758-59 (4th Cir. 1991) (same); *Falcone*, 934 F.2d at 1541 (same); *United States v. Schwartz*, 899 F.2d 243, 246 (3d Cir.) (same), *cert. denied*, 498 U.S. 901 (1990); *United States v. Medeles*, 916 F.2d 195, 201-02 (5th Cir. 1990) (same); *United States v. Bonallo*, 858 F.2d 1427, 1430-35 (9th Cir. 1988) (same); *Bonnett*, 877 F.2d at 1454-56 (same).

44. 458 U.S. at 304 (citing *United States v. Giordano*, 489 F.2d 327 (2d Cir. 1973) and *United States v. Constant*, 501 F.2d 1284 (5th Cir. 1974), *cert. denied*, 420 U.S. 910 (1975)); *accord* *United States v. Clausen*, 792 F.2d 102, 104 (8th Cir.) (wire fraud; "scheme to defraud need not include false representations") (citing *United States v. Frankel*, 721 F.2d 917, 921 (3rd Cir. 1983) and *United States v. Halbert*, 640 F.2d 1000, 1007 (9th Cir. 1981) (scheme or artifice to defraud does not require misrepresentations), *cert. denied*, 479 U.S. 858 (1986)). See also *United States v. Cronin*, 900 F.2d 1511, 1516 (10th Cir. 1990) (check kiting may not be based on mail fraud where misrepresentation clause alone is relied upon); *United States v. Rafsky*, 803 F.2d 105, 108 (3d Cir. 1986) (check kiting conviction upheld), *cert. denied*, 480 U.S. 931 (1987); *United States v. Pick*, 724 F.2d 297, 300 (2d Cir. 1983) (mail fraud; check kiting conviction upheld without discussion of fraud); *Frankel*, 721 F.2d at 921 (mail fraud); *United States v. Scott*, 701 F.2d 1340, 1343 (11th Cir.) (mail fraud; "or" defines two separate offenses: defraud or misrepresentation), *cert. denied*, 464 U.S. 856 (1983); *Halbert*, 640 F.2d at 1007 (mail fraud; no representation required for scheme to defraud); *United States v. Scott*, 554 F.2d 866, 867 (8th Cir. 1977) (mail fraud; check kiting conviction upheld without discussion of fraud); *United States v. Shepherd*, 511 F.2d 119, 121-22 (5th Cir. 1975) (same); *United States v. Strauss*, 452 F.2d 375, 380 (7th Cir. 1971) (same), *cert. denied*, 405 U.S. 989 (1972); *Lemon v. United States*, 278 F.2d 369, 373 (9th Cir. 1960) (mail fraud; "[n]o actual misrepresentation of fact is necessary to make the crime complete.").

45. *Pereira*, 347 U.S. at 8 ((1) scheme to defraud (2) intent to defraud and (3) use of mails); *Durland*, 161 U.S. at 313; *United States v. Hanson*, 41 F.3d 580, 582-84 (10th Cir. 1994) (no state of mind; no conspiracy, mail or wire fraud); *United States v. Cederquist*, 641 F.2d 1347, 1351 (9th Cir. 1981); *Williams v. United States*, 278 F.2d 535, 537 (9th Cir. 1960).

46. *Carpenter*, 484 U.S. at 27.

ordinary prudence and comprehension.”<sup>47</sup> The “contemplated loss”, however, need not be easily measurable. In *United States v. Richman*,<sup>48</sup> the loss was of an opportunity to bargain because a lawyer plotted to pay an insurance agent to settle a claim. The Seventh Circuit did not require the government to prove that the settlement itself was higher than it might otherwise have been; the payment to the employee deprived the insurer of the opportunity to bargain, which was a sufficient loss. Good faith is a complete defense to a charge of mail fraud, because it negates an intent to defraud.<sup>49</sup> Advice of counsel, for example, negates such an intent.<sup>50</sup>

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47. *Silverman v. United States*, 213 F.2d 405, 410 (5th Cir.), *cert. denied*, 348 U.S. 828 (1954); *Blachly v. United States*, 380 F.2d 665, 671 (5th Cir. 1967) (citing *Silverman*); *Gusow v. United States*, 347 F.2d 755, 756 (10th Cir.) (same), *cert. denied*, 382 U.S. 906 (1965). *But see* *United States v. Coffman*, 94 F.3d 330; 1996 U.S. App. Lexis 22174 (7th Cir. August 27, 1996) \*5-6:

But it is hard to believe that this language is intended to be understood literally, for if it were it would invite con men to prey on people of below-average judgment or intelligence, who are anyway the biggest targets of such criminals and hence the people most needful of the law's protection—and most needful or not are within its protective scope . . . . “Taking advantage of the vulnerable is a leitmotif of fraud.” . . . It would be very odd for the law to protect only those who, being able to protect themselves, do not need the law's protection. In fact picking on the vulnerable normally makes your conduct more rather than less culpable, earning you a heavier sentence. . . .

[Under the law of this circuit] mail- and wire-fraud statutes protect the gullible against frauds directed against them, yet [decisions also] aligns us with those courts that define mail and wire fraud in terms of misrepresentations or omissions calculated to deceive a reasonable person. We doubt that there is a real inconsistency. The “reasonable person” language has two purposes, neither of which has anything to do with declaring open season on the people most likely to be targets of fraud. The first is to guide the jury in evaluating circumstantial evidence of fraudulent intent: that the defendants' scheme was calculated to deceive a person of ordinary prudence is some evidence that it was intended to deceive. . . . Evidence that the scheme could fool only an idiot would not be evidence of such intent—would be, if anything, evidence against an inference of such intent—unless the scheme was aimed at an idiot. But if it were, this would make it a case of direct evidence of wrongful intent. The fact that a reasonable person would not have been deceived would be no more relevant than the fact that a murder victim would have survived had he been wearing a bulletproof vest. (citation omitted).

*See also* *United States v. Brown*, 79 F.3d 1550, 1559 (11th Cir. 1996) (mail fraud; reasonable persons could not find that persons of ordinary prudence purchasing a home in Florida would rely on developer's affirmative representations of value).

48. 944 F.2d 323, 329-31 (7th Cir. 1991).

49. *Durland*, 161 U.S. at 314.

50. *See, e.g.,* *Dan River, Inc. v. Icahn*, 701 F.2d 278, 291 (4th Cir. 1983) (RICO mail fraud; because criminal intent is necessary, and where, as here, the defendant acts pursuant to bona fide legal opinions, it is extremely unlikely that predicate acts can be proved); *see also* *Williamson v. United States*, 207 U.S. 425, 453 (1908) (conspiracy to suborn perjury; instruction, concerning good faith reliance on advice of counsel, upheld: “

[I]f a man honestly and in good faith seeks advice of a lawyer as to what he may lawfully do . . . and fully and honestly lays all the facts before his counsel, and in good faith and honestly follows such advice, relying upon it and believing it to be correct, and only intends that his acts shall be lawful, he . . . [can] not be convicted of crime which involves willful and unlawful intent . . . .”;

*United States v. Traitz*, 871 F.2d 368, 382-83 (3d Cir.) (good faith reliance on advice of counsel requires disclosure of all material facts to attorney, including both means and ends surrounding conduct in question), *cert. denied*, 493 U.S. 821 (1989); *United States v. Poludniak*, 657 F.2d 948, 958-59 (8th Cir. 1981) (advice of counsel on good faith submitted to jury in conspiracy to extort), *cert. denied*, 455 U.S. 940 (1982); *Tarvestad v. United*

Second, where representations or omissions are, in fact, at issue, the defendant must be at least reckless as to the truth or falsity of representations or omissions made in the course of the scheme.<sup>51</sup> An omission—or failure to disclose—need not rest on a “clear legal” duty; it is sufficient if it is widely accepted in the community.<sup>52</sup>

Because state of mind is rarely amenable to direct proof, the prosecutor or plaintiff may use circumstantial evidence to prove “intent to defraud.”<sup>53</sup> In *Aiken v. United States*,<sup>54</sup> the Fourth Circuit discussed the circumstances from which intent could be inferred: Fraudulent intent . . . is too often difficult to prove by direct and convincing evidence. In many cases it must be inferred from a series of seemingly isolated acts and instances which have been rather aptly designated as badges of fraud. When these are sufficiently numerous they may in their totality properly justify an inference of a fraudulent intent . . . . The most “powerful”

*States*, 418 F.2d 1043, 1047 (8th Cir. 1969) (advice of counsel on good faith submitted to jury in securities fraud prosecution), *cert. denied*, 397 U.S. 935 (1970). The circuit courts of appeal are in conflict on the requirement of a separate instruction on good faith. *Green v. United States*, 474 U.S. 925 (1985) (White, J. in dissent to a denial of certiorari; cases collected); *United States v. Gross* 961 F.2d 1097, 1102 (3rd Cir. 1992) (not required; majority do not require separate instruction) (citing *United States v. Casperson*, 773 F.2d 216, 223-24 (8th Cir. 1985) (required) and *United States v. Hopkins*, 744 F.2d 716, 718 (10th Cir. 1984) (en banc) (required)). *See also* *United States v. Camuti*, 78 F.3d 738, 744 (1st Cir. 1996) (not required); *United States v. Sinang*, 70 F.3d 588, 591 (11th Cir. 1995) (not required).

51. *See* *United States v. Hannigan*, 27 F.3d 890, 892 (3d Cir. 1994) (reckless failure to acquire knowledge); *United States v. Wingate*, 997 F.2d 1429, 1433 (11th Cir. 1993) (conviction in credit card fraud upheld although evidence could be construed to show negligence rather than intent to defraud); *United States v. Gay*, 967 F.2d 322, 326 (9th Cir.) (reckless indifference sufficient), *cert. denied*, 506 U.S. 929 (1992); *United States v. Schaflander*, 719 F.2d 1024, 1027 (9th Cir. 1983) (reckless disregard for truth or falsity sufficient to sustain conviction), *cert. denied*, 467 U.S. 1216 (1984); *United States v. Henderson*, 446 F.2d 960, 966 (8th Cir.) (ignorance of inculpatory facts due to reckless disregard is no defense), *cert. denied*, 404 U.S. 991 (1971); *Irwin v. United States*, 338 F.2d 770, 774 (9th Cir. 1964) (defendant acted with reckless indifference in adopting “dishonest” opinion), *cert. denied*, 381 U.S. 911 (1965).

52. *Richman*, 944 F.2d at 333 (attorney paying claims adjuster and concealing payment from insurer); *see also* *United States v. UCO Oil Co.*, 546 F.2d 833, 836 (9th Cir. 1976) (applying 18 U.S.C. § 1001; “[t]he law of fraud knows no difference between express representation . . . and implied misrepresentation or concealment . . .”) (quoting *Charles Hughes & Co. v. SEC*, 139 F.2d 434, 437 (2d Cir. 1943), *cert. denied*, 321 U.S. 786 (1944)), *cert. denied*, 430 U.S. 966 (1977).

53. *United States v. Behr*, 33 F.3d 1033, 1035 (8th Cir. 1994) (direct evidence of intent is not required; intent may be inferred from circumstances); *United States v. Cople*, 24 F.3d 535, 545 (3d Cir.) (“Proving specific intent in mail fraud cases is difficult, and, as a result, a liberal policy has developed to allow the government to introduce evidence that even peripherally bears on the question of intent.”), *cert. denied*, 115 S. Ct. 488 (1994); *United States v. Ham*, 998 F.2d 1247, 1254 (4th Cir. 1993) (direct evidence of intent not required; intent may be inferred from circumstances), *cert. denied*, 116 S. Ct. 513 (1995); *United States v. Hatch*, 926 F.2d 387, 396 (5th Cir.) (circumstantial evidence is sufficient to support a criminal conviction and does not shift the burden of proof), *cert. denied*, 500 U.S. 943 (1991); *United States v. Pritchard*, 773 F.2d 873, 878 (7th Cir. 1985) (failure to pay for goods where defendant misrepresented himself as government agent purchasing eavesdropping equipment constitutes strong evidence of intent to defraud), *cert. denied*, 474 U.S. 1085 (1986); *United States v. Stull*, 743 F.2d 439, 442 (6th Cir. 1984) (“where sufficient circumstantial evidence is presented, the jury may properly infer that the defendant was culpably involved from his conduct, statements, and role in the overall operation”) (citations omitted), *cert. denied*, 470 U.S. 1062 (1985).

54. 108 F.2d 182, 183 (4th Cir. 1939).

circumstantial evidence of fraud is an "elaborate effort" to conceal activity.<sup>55</sup>

Intent to deprive or harm another or to benefit oneself may be inferred, for example, from evidence of an actual deprivation, a harm inflicted, or a benefit gained.<sup>56</sup> The converse is also true: "[t]he failure to benefit from a scheme . . . may mirror the defendant's good faith."<sup>57</sup> To intend to defraud, the defendant must possess knowledge of the scheme to defraud.<sup>58</sup> Accordingly, sales employees who sell fraudulent investments may not be aware that the product is unsound; if so, they are not involved in the scheme.<sup>59</sup> Such salesmen, however, are not necessarily innocent.<sup>60</sup> Deliberate avoidance of knowledge, too, will be treated as knowledge.<sup>61</sup>

The defendant's conduct in the execution of the scheme is the key source of circumstantial evidence of "intent to defraud." The prosecutor or plaintiff may introduce evidence of deceptive conduct, such as false or misleading representations. While misrepresentations relating to intent in reference to future acts were not subject to prosecution at common law, this rule does not restrict the mail fraud statute. "[I]t includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future."<sup>62</sup> The prosecutor or plaintiff may also introduce evidence of non-disclosure or concealment of material facts.<sup>63</sup>

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55. *United States v. Olson*, 925 F.2d 1170, 1176 (9th Cir. 1991) (citing *Dial*, 757 F.2d at 170); *see also* *United States v. Davis*, 752 F.2d 963, 970 (5th Cir. 1985) (discussing "evidence . . . that would allow the jury to infer the existence of a fraudulent scheme"); *United States v. Lanier*, 838 F.2d 281, 284 (8th Cir. 1988) (fraudulent loan scheme); *United States v. Clausen*, 792 F.2d 102 (brokerage scheme); *United States v. Stephens*, 779 F.2d 232, 235-36 (5th Cir. 1985) (secret bank account); *United States v. Shewfelt*, 455 F.2d 836, 841 n.4 (9th Cir.) (land fraud), *cert. denied*, 406 U.S. 944 (1972).

56. *United States v. Meyer*, 359 F.2d 837, 839-40 (7th Cir.), *cert. denied*, 385 U.S. 837 (1966).

57. *Id.* at 840.

58. *Compare* *United States v. Navarro-Ordas*, 770 F.2d 959, 966 (11th Cir. 1985) (large loans gave rise to inference of knowledge despite plea of ignorance), *cert. denied*, 475 U.S. 1016 (1986) *with* *United States v. Kessi*, 868 F.2d 1097, 1104 (9th Cir. 1989) (knowledge is more than suspicion that others may be involved in questionable dealings).

59. *United States v. Parker*, 839 F.2d 1473, 1479 (11th Cir. 1988).

60. *See, e.g., United States v. Simon*, 839 F.2d 1461, 1470 (11th Cir.) (boiler room operation), *cert. denied*, 488 U.S. 861 (1988); *United States v. Ramsey*, 785 F.2d 184, 188 (7th Cir.) (loan scheme), *cert. denied*, 476 U.S. 1186 (1986).

61. *See, e.g., United States v. Anderskow*, 88 F.3d 245, 252-53 (3rd Cir. 1996) (willful blindness instruction upheld based on "overwhelming circumstantial evidence"); *United States v. William*, 83 F.3d 218 (8th Cir. 1996) 1996 U.S. App. Lexis 10250 \*5-\*9 (conviction upheld based on Eighth Circuit Model Criminal Jury Instruction 7.04 (willful blindness) based on *United States v. Massa*, 740 F.2d 629, 643 (8th Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985)); *United States v. Camuti*, 78 F.3d 738, 744 (1st Cir. 1996) (§ 1341 (mail fraud); conviction upheld based on willful blindness instruction); *United States v. Mancuso*, 42 F.3d 836, 846 (4th Cir. 1994) (§§ 371 (conspiracy to defraud) § 1344 (bank fraud); conviction upheld based on willful blindness instruction); *Ramsey*, 785 F.2d at 189. *See generally*, Smith, *Recklessness and Good Faith Under Mail Fraud Statute: Mens Rea by Accident*, 27 CRIM. L. BULL. 315, 315-26 (1991).

62. *Durland*, 161 U.S. at 313.

63. Non-disclosure and concealment most commonly arise in political corruption cases. *See, e.g., United States v. Isaacs*, 493 F.2d 1124 (7th Cir.) (mailing of bribery proceeds by former Governor and state official was final step by which conspiracy to defraud could be concealed), *cert. denied*, 417 U.S. 976 (1974).

Several other methods are used to prove intent to defraud. The prosecutor or plaintiff may also use evidence of "other crimes" to prove "intent to defraud."<sup>64</sup> Expert testimony on "methods and techniques" of unlawful activity is helpful.<sup>65</sup> Summary testimony, too, is often helpful for a jury.<sup>66</sup> Obtaining confidential information improperly from the other side in litigation is evidence of "intent to defraud."<sup>67</sup> Destruction of records and concealing evidence during discovery is also evidence of participation in a conspiracy to defraud.<sup>68</sup>

The issue of "intent to defraud" under mail fraud is similar to finding "willfulness" in tax evasion. In *Spies v. United States*,<sup>69</sup> the Supreme Court catalogued evidence from which intent to evade may be inferred:

[W]e would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime.

In this case . . . several items of evidence . . . will support an inference of willful attempt to evade or defeat the tax. . . . [P]etitioner insisted that certain income be paid to him in cash, transferred it to his own bank by armored car, deposited it, not in his own name but in the names of others of his family, and kept inadequate and misleading records. Petitioner claims other motives animated him in these matters. We intimate no opinion. Such inferences are for the jury.

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64. *United States v. Reddeck*, 22 F.3d 1504, 1509 (10th Cir. 1994) (prior conviction for mail fraud); *United States v. Robichaux*, 995 F.2d 565, 568 (5th Cir.) (prior use of fraudulent securities), *cert. denied*, 114 S. Ct. 322 (1993); *United States v. Osum*, 943 F.2d 1394, 1403-04 (5th Cir. 1991) (subsequent fraudulent accidents). Where illegal conduct is part of a scheme, related transactions are "intrinsic," not "extrinsic;" accordingly, the related transactions are *not* subject to the limitations of Fed. R. Evid. 404(a). *See, e.g., United States v. Allen*, 76 F.3d 1348, 1364 (5th Cir. 1996) ("the forgeries were the very fraud"); *United States v. Swinton*, 75 F.3d 374, 378 (8th Cir. 1996) ("where the charged offenses were not isolated acts, but rather, were part of the series of transactions involving the same principal actors, in the same roles, and employing the same general modus operandi, the various acts may be considered to constitute a single scheme"); *accord United States v. Moscatell*, 42 F.3d 627, 69-30 (11th Cir. 1995).

65. *See, e.g. United States v. Alonso*, 48 F.3d 1536, 1540-44 (9th Cir. 1995) (surveillance and counter-surveillance in credit card scheme).

66. *Osum*, 943 F.2d at 1403-04; *see also United States v. McDonald*, 576 F.2d 1350, 1356 (9th Cir.) (subsequent fraudulent acts relevant to show prior state of mind), *cert. denied*, 439 U.S. 830 (1978).

67. *Richman*, 944 F.2d at 333-34.

68. *United States v. Brown*, 943 F.2d 1246, 1250-51, 1253 (10th Cir. 1991). False testimony in a grand jury may also be obstruction of justice. *See, e.g., United States v. Lahey*, 55 F.3d 1289, 1293 (7th Cir. 1995) (obstruction of justice under 18 U.S.C. § 1503 as well as perjury under 18 U.S.C. § 1621). Obstruction of justice is a predicate offense under RICO. *Agency Holding Corp. v. Malley-Duff Assoc.*, 792 F.2d 341, 344 n.4 (3d Cir. 1984), *aff'd on other grounds*, 483 U.S. 143 (1987); *Miller v. Glen and Helen Aircraft, Inc.*, 777 F.2d 496, 498-99 (9th Cir. 1985).

69. 317 U.S. 492, 499-500 (1943).

Courts impose limits, however, on circumstantial evidence. A misrepresentation must relate to what is bargained for to be evidence of "intent to defraud".<sup>70</sup> The defendant must deceive his victim as to the quality or nature of the deal. Insurance company defrauders, for example, must convince the company that the personal injury claims are genuine.<sup>71</sup>

Evidence of misrepresentations about unimportant or extraneous matters does not suffice. In *United States v. Pearlstein*,<sup>72</sup> the appellants were salesmen for GMF/ElginPen. As part of their sales pitch to potential distributorship purchasers, the salesmen exaggerated their roles in the company's operation and made false statements about their own business background.<sup>73</sup> The Third Circuit held "such misrepresentations did not relate to the essential feature of their presentations . . . and hardly can be construed as fraudulent."<sup>74</sup>

Further, a seller's mere "puffing" or innocent exaggeration of the qualities that his wares possess is insufficient circumstantial evidence of "intent to defraud."<sup>75</sup> For example, a scheme in which the perpetrator induces the victim to invest money in exchange for future profits usually involves representations as to the amount of profit to be realized. If the "business" is new, the perpetrator may now know whether his facts are accurate, but his failure to inquire into their accuracy may lead to an inference that he is indifferent to the truth.<sup>76</sup>

4. *Result For Criminal Liability*: A result is not required for a criminal mail fraud prosecution. Thus, unlike most state fraud statutes, the mail fraud statute does not require the actual obtaining of property; § 1341 requires only that the schemer intent to execute a scheme or artifice to defraud. It does not require that the scheme be completed or successfully carried out.<sup>77</sup> Because completion or success of the scheme is not a part of the offense, a showing of actual damage or harm to the victim is unnecessary.<sup>78</sup>

5. *Use of the Mails*: Mail fraud requires the use of the mails. Anyone who

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70. *United States v. Pearlstein*, 576 F.2d 531, 544 (3d Cir. 1978); *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1182 (2d Cir. 1970).

71. *United States v. Unger*, 295 F.2d 889, 890 (7th Cir. 1961).

72. 576 F.2d 531, 534 (3d Cir. 1978).

73. *Id.* at 535-37.

74. 576 F.2d at 544.

75. *See, e.g.*, *United States v. New South Farm & Home Co.*, 241 U.S. 64, 71 (1916) (advertised product failed to do what was claimed); *Cook, Perkiss & Liehe, Inc. v. Northern Ecol. Collection Service, Inc.*, 911 F.2d 242, 246 (9th Cir. 1990) (Lanham Act; puffing question of fact; consumer reliance must be induced by specific, not general assertions); *Simon*, 839 F.2d at 1467-68 (discussion of differences between puffery and fraud); Comment, *Mail Fraud-Fraudulent Misrepresentations Must Be Distinguished from 'Puffing' or 'Sellers' Talk' in Offenses Under 18 U.S.C. § 1341*, 22 S.C.L. Rev. 434 (1970).

76. *Irwin*, 338 F.2d at 774 (reckless indifference as to truth of representations that mail order franchises would be profitable).

77. *Durland*, 161 U.S. at 315; *United States v. Utz*, 886 F.2d 1148, 1149-51 (9th Cir. 1989), *cert. denied*, 497 U.S. 1005 (1990); *Blachly*, 380 F.2d at 673.

78. *Fineberg v. United States*, 393 F.2d 417, 419 (9th Cir. 1968); *United States v. Andreadis*, 366 F.2d 423, 431 (2d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967).

“places in any post office or authorized depository . . . or takes or receives therefrom . . . or knowingly causes to be delivered by mail” any matter for the purpose of executing a fraudulent scheme commits the offense of mail fraud.<sup>79</sup> Each use of the mails is a separate offense.<sup>80</sup> If the defendant himself, or his agent<sup>81</sup>, sends or receives material through the mail, he is chargeable under § 1341. But it is only necessary that he “cause” the use of the mails. In *Pereira*<sup>82</sup>, a § 1341 violation occurred where the sender and receiver were two banks, neither of which was a perpetrator of the scheme. The defendant’s use of the mails, however, must be in execution or in furtherance of the scheme to defraud.

“The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud . . . .” To be part of the execution of the fraud, however, the use of the mails need not be an essential element of the scheme. It is sufficient for the mailing to be ‘incident to an essential part of the scheme,’ . . . or ‘a step in [the] plot.’<sup>83</sup>

The mailings may be themselves “innocent.”<sup>84</sup> The sequence of events and the closeness of the relationship between the mailing and the scheme determine whether this requirement is satisfied. Generally, if the mailing occurs before the conception, or after the completion of the scheme, the use of the mails is not in furtherance of the scheme.<sup>85</sup> The point at which the schemer obtains the fruits of his efforts is generally considered the completion of the scheme.<sup>86</sup> In *Maze*, the Court held that mailings of credit card invoices from the merchant to the credit company or from the company to the cardholder were not mailings in furtherance of a credit card swindle, even though the defendant caused the mailings.<sup>87</sup> The

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79. 18 U.S.C. § 1341.

80. *Badders v. United States*, 240 U.S. 391, 394 (1916); *United States v. Rogers*, 960 F.2d 1501, 1514 (10th Cir.), *cert. denied*, 113 S. Ct. 817 (1992); *see also* *United States v. Castillo*, 829 F.2d 1194, 1199 (1st Cir. 1987) (wire fraud).

81. *United States v. Kenofsky*, 243 U.S. 440, 443 (1917); *United States v. Mitchell*, 744 F.2d 701, 704 (9th Cir. 1984).

82. 347 U.S. at 8-9; *see also* *Mitchell*, 744 F.2d at 704 (notice from real estate council sent to owners of condominium).

83. *Schmuck v. United States*, 489 U.S. 705, 710-11 (1989) (quoting *Kahn v. United States*, 323 U.S. 88, 95 (1944), *Pereira v. United States*, 347 U.S. 1, 8 (1954), and *Badders*, 240 U.S. at 394)(citations omitted). *Schmuck*’s subjective test for execution of mailing (scheme as conceived by perpetrator) is analyzed in Ellen S. Podgor, *Mail Fraud: Opening Letters*, 43 S.C.L. Rev. 223, 239-54, 258 (1992) (decision in “confusion”).

84. *Schmuck* at 715; *Kehr Packages v. Fidelcor, Inc.*, 926 F.2d 1406, 1415 (3d Cir.) (RICO mail fraud), *cert. denied*, 501 U.S. 1222 (1991).

85. *Maze*, 414 U.S. at 402; *see also* *Parr v. United States*, 363 U.S. 370, 393 (1960); *Kahn*, 323 U.S. at 94; *United States v. Beall*, 126 F. Supp. 363, 365 (N.D. Cal. 1954); *cf.* *United States v. Wolf*, 561 F.2d 1376, 1380 (10th Cir. 1977) (mailings subsequent to defendant’s sale of accounts receivable and receipt of payment were not in furtherance of scheme); *United States v. West*, 549 F.2d 545, 556 (8th Cir.) (phone calls subsequent to defendant’s gaining physical possession of cattle through fraudulent means were not in furtherance of scheme), *cert. denied*, 430 U.S. 956 (1977).

86. *Kenofsky*, 243 U.S. at 443.

87. *Maze*, 414 U.S. at 399.



defendant stole the card and used it to pay for motel accommodations and restaurants. The Court held that the scheme was completed when the defendant checked out of the motel, having irrevocably received the fraudulently obtained goods and services. The subsequent mailings were for the purpose of adjusting the accounts among the defrauded parties and in no way affected the success of the scheme. Because the use of the mails occurred after the scheme's fruition and possessed no relation to its success, it was not in furtherance of the swindle.<sup>88</sup>

Courts create an exception to this general rule, however, for the mailing of "lulling" letters. Lulling letters are designed to convince the fraud victim that all is well. They preserve or create the appearance of a legitimate transaction and they postpone inquiries and complaints and avoid detection.<sup>89</sup> Such letters, even though mailed after the completion of the scheme, are considered to be in furtherance of it.<sup>90</sup> In *Sampson*,<sup>91</sup> the defendants used lulling letters in the execution of an advance-fee racket. After obtaining a loan application form and a filing fee from each applicant, defendants failed to carry out their promises to aid the applicants in obtaining loans. Defendants mailed accepted applications and letters of assurance to the applicants to lull them into a false sense of security and to postpone complaints. The Court held that these mailings were in furtherance of the fraudulent scheme.<sup>92</sup> The Court also held that *Parr* and *Kann* did not set down an absolute rule that use of the mails after obtaining the fruits of the scheme can never be for the purpose of executing the scheme.<sup>93</sup> The second component of the "in furtherance" requirement mandates that the mailing be "sufficiently closely related" to the scheme.<sup>94</sup>

Many decisions elaborate on the nature of the relationship between the mailing and the scheme.<sup>95</sup> This component is fulfilled when the mailing is "incident to an essential part of the scheme."<sup>96</sup> In *Pereira*, the mailing of the \$35,000 check from one bank to another was incident to an essential part of the scheme, namely, obtaining the money. The defendant caused his wife to sell some securities she

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88. *Id.* at 402.

89. *See, e.g.*, *United States v. Sampson*, 371 U.S. 75 (1962); *McDonald*, 576 F.2d 1350; *cf. United States v. Staszczuk*, 502 F.2d 875, 881 (7th Cir. 1974) (public hearing notices were not lulling letters because they were not used to conceal and continue a fraud), *cert. denied*, 423 U.S. 837 (1975).

90. *United States v. Brown*, 578 F.2d 1280, 1285 (9th Cir.) (securities fraud), *cert. denied*, 439 U.S. 928 (1978).

91. 371 U.S. 75 (1962).

92. *Id.* at 80-81.

93. 371 U.S. at 80.

94. *Maze*, 414 U.S. at 399.

95. *See, e.g.*, *United States v. Brown*, 583 F.2d 659, 668 (3d Cir. 1978) ("if the mailing is a part of executing the fraud, or is closely related to the scheme, a mail fraud charge will lie"), *cert. denied*, 440 U.S. 909 (1979); *United States v. La Ferriere*, 546 F.2d 182, 187 (5th Cir. 1977) ("the dependence in some way of the completion of the scheme or the prevention of its detection on the mailings in question"); *Adams v. United States*, 312 F.2d 137, 140 (5th Cir. 1963) ("significantly related to those operative facts making the fraud possible or constituting the fraud").

96. *Pereira*, 347 U.S. at 8.

possessed in Los Angeles. She received a \$35,000 check from her broker in that city and gave it to her husband, who endorsed it for collection to an El Paso bank. The check was mailed from Texas to California in the ordinary course of business. The check cleared and a cashier's check for the amount was drawn in favor of the defendant, who absconded with the money. In general, the *Pereira* "incident to an essential element" test is interpreted narrowly.<sup>97</sup> In brief, the use of the mails must be in furtherance of the scheme, not merely incidental or collateral to it.<sup>98</sup>

To further the scheme, the mailing must aid it in some way and its purpose must not be at odds with the successful completion of the scheme.<sup>99</sup> In *Staszczuk*, the scheme was to obtain approval of zoning amendments by means of bribery. The purpose of the mailing of public hearing notices was "to provide an opportunity for affected persons to state objections to the proposed zoning changes."<sup>100</sup> This purpose conflicted with the execution of the scheme. Use of the mails that only increased the likelihood of defendant's detection and apprehension is not within § 1341.<sup>101</sup> Courts also hold that legally compelled mailings or routine mailings to carry out convenient procedures of a legitimate business are not in furtherance of a scheme, even though they may incidentally benefit it.<sup>102</sup> Innocent mailings are not rendered fraudulent merely because they occurred while a scheme was in progress.<sup>103</sup> Of course, if a routine mailing is a part of perpetrating the fraud, or is closely related to the scheme, the mailing is within the statute despite its secondary legitimate function.<sup>104</sup>

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97. See, e.g., *La Ferriere*, 546 F.2d at 186 ("The Court's language [in *Pereira*] does not mean . . . that a mailing somehow related to an aspect of the scheme brings the scheme within the scope of the mail fraud statute"; an attorney's letter on behalf of his client demanding verification that money deposited was still in escrow was not a necessary step in the scheme, although it was related to the post-fruition lulling element). But see *Ohrynowicz v. United States*, 542 F.2d 715, 718 (7th Cir. 1976) (opening of checking account was essential part of scheme; mailing pursuant to ordering of personalized checks is in furtherance of scheme even though the defendant used only nonpersonalized checks in the scheme), *cert. denied*, 429 U.S. 1027 (1976).

98. *United States v. Edwards*, 458 F.2d 875, 883 (5th Cir.), *cert. denied*, 409 U.S. 891 (1972); *Adams*, 312 F.2d at 139.

99. *Staszczuk*, 502 F.2d at 880.

100. *Id.*

101. See also *Maze*, 414 U.S. at 403 (mailing of credit card invoices made detection more likely); *La Ferriere*, 546 F.2d at 187 (attorney's letter of complaint would "further detection of the fraud or . . . deter its continuation").

102. See *Parr*, 363 U.S. at 391 (legally compelled letters, tax statements, receipts, and checks are not within § 1341); *Brown*, 583 F.2d at 668 (business mailings in connection with obtaining a loan under false pretenses were unrelated to the fraud; "a mailing . . . for the purpose of fulfilling a business or legal procedure unrelated to the fraud and . . . not closely connected with the fraud . . . is too remote to convert a state law fraud into federal mail fraud, even though the mailing has the incidental effect of assisting the scheme."). The status of *Parr*'s exclusion of "legally required" mailings is in question. See, e.g., *United States v. Green*, 786 F.2d 247, 249-50 (7th Cir. 1986) (*Parr* dicta; may be included in scheme if important to success of scheme); *United States v. Corry*, 681 F.2d 406, 412-13 (5th Cir. 1982) (may be included in scheme if include false statement).

103. *Id.* at 668; see also *United States v. Tarnopol*, 561 F.2d 466, 472 (3d Cir. 1977) (routine mailing of packing slips).

104. See *Brown*, 583 F.2d at 668 (request for wholesale financing as part of scheme to obtain new car inventory, sell cars for cash and abscond with the cash under guise of robbery).

Other mailings that are sufficient include mailings that are products of the scheme, mailings incidentally informing co-schemers of the plan's progress, and mailings of certificates or securities to the victim following a purchase.<sup>105</sup> Mailings causing a delay necessary to the completion or continuation of a scheme are also in furtherance of the scheme. In *Maze*,<sup>106</sup> the Court rejected the contention that the delay caused by the mails was essential to continuation of the scheme by postponing its detection; the delay was due to distance, not due to the mail service. Such mailings are often instrumental in the success of check-kiting schemes and credit card swindles.<sup>107</sup>

The statute requires no particular state of mind to accompany a sending or receiving of mails. When the prosecution seeks to establish the conduct element by showing that the defendant "caused" the use of the mails, however, § 1341 requires that he "knowingly" engage in the conduct that "causes" the mailing. The courts' definition of the causal relation between the conduct and the resulting mailing is relatively easy to prove. In *Pereira*, the defendant endorsed a check to a bank for collection. Since banks mail endorsed checks in the ordinary course of business, the Court reasoned, it was "reasonably foreseeable" that the endorsement would result in a use of the mails. The Court concluded that "[w]here one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used."<sup>108</sup>

Similarly, courts hold that the use of a credit card resulting in the mailing of invoices from the merchant to the credit company or from the company to the cardholder also constitutes "causing" the use of the mails.<sup>109</sup> The mailings are "reasonably foreseeable" because they are the normal result of using a credit card. In short, § 1341 requires only that the defendant knowingly takes some action that has the reasonably foreseeable result of a use of the mails.

6. *Pleading Fraud for Civil Liability*: No private claim for relief is implied into criminal mail fraud.<sup>110</sup> Nevertheless, when mail fraud is combined with RICO, a

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105. *United States v. Hasenstab*, 575 F.2d 1035, 1039 (2d Cir.) (mailing of requisitions closely connected with kickback scheme), *cert. denied*, 439 U.S. 827 (1978); *United States v. Craig*, 573 F.2d 455, 4843 (7th Cir. 1977) (notices of meetings informed co-schemers of the status of a bill; goal of scheme was passage of the bill), *cert. denied*, 439 U.S. 820 (1978); *United States v. Tallant*, 547 F.2d 1291, 1298 (5th Cir.) (mailing securities was integral part of scheme), *cert. denied*, 434 U.S. 889 (1977); *Edwards*, 458 F.2d at 883 (mailing of divorce decrees was final step in scheme).

106. 414 U.S. at 403.

107. *See, e.g., United States v. Foshee*, 569 F.2d 401, 406 (5th Cir. 1978); *Williams*, 278 F.2d at 538; *cf. United States v. Braunig*, 553 F.2d 777, 781 (2d Cir.) (bank policy of crediting international checks to the account before confirmation from drawee bank allowed defendant to withdraw funds before discovery of forgery), *cert. denied*, 431 U.S. 959 (1977).

108. 347 U.S. at 8-9; *see also Ikuno v. Yip*, 912 F.2d 306, 311 (9th Cir. 1990) (RICO "reasonably foresee").

109. *Maze*, 414 U.S. at 403; *United States v. Kelem*, 416 F.2d 346 (9th Cir. 1969), *cert. denied*, 397 U.S. 952 (1970).

110. *Ryan v. Ohio Edison Co.*, 611 F.2d 1170, 1172-79 (6th Cir. 1979); *Bell v. Health-Mor, Inc.*, 549 F.2d 342, 346 (5th Cir. 1977).

private claim for relief exists. In the two-year period following the *Sedima* decision in 1985, however, as many as 51.1% of the RICO complaints were dismissed.<sup>111</sup> A principal ground for dismissal was failure to comply with Federal Rule of Civil Procedure 9(b) (pleading fraud with particularity). The Rule embraces not only fraud in the inducement for liability, but also concealment for tolling the statute of limitations.<sup>112</sup>

Circuit court decisions reflect varying attitudes toward pleading fraud with particularity.<sup>113</sup> Pleading fraud with particularity in reference to actions taken by third parties under RICO is difficult.<sup>114</sup> Most courts hold that plaintiffs pleading fraud must identify the time and place of the fraud, the contents, if any, of the alleged misrepresentations or omissions, and the identity of the party or parties perpetrating the fraud.<sup>115</sup> A failure to plead fraud with particularity may warrant

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111. Blakey & Caesar, *supra* MAIN TEXT note 3, at 620.

112. Davis v. Grusemeyer, 996 F.2d 617, 624-27 (3d Cir. 1993).

113. See generally, Cayman Exploration Corp. v. United Gas Pipe Line Co., 873 F.2d 1357, 1362-63 (10th Cir. 1989) (Rule 9(b) applicable to fraud elements of RICO; not abuse to permit repleading; circuit court decisions collected); Kathryn M. Callahan, Comment, *Civil Procedure—Pleading RICO Mail and Wire Fraud with Particularity Under Rule 9(b)*, 22 SUFFOLK U.L. REV. 1226 (1988).

114. Compare Vicom, Inc. v. Harbridge Merchant Servs., 20 F.3d 771, 778 n.5 (7th Cir. 1994) (Rule 9(b) requires the delineation of roles, but it may be relaxed when alleging fraud against third party or information uniquely in hands of defendant), and Michaels Bldg. Co. v. Ameritrust Co. N.A., 848 F.2d 674, 679 (6th Cir. 1988) (Rules 8 and 9 must be read in harmony; particularity requirement relaxed if information is in hands of defendant), and New England Data Servs., Inc. v. Becher, 829 F.2d 286, 290-92 (1st Cir. 1987) (Rule 9(b) applies, but discovery may be permitted for facts not within plaintiff's control), and Seville Indus. Machinery Corp. v. Southmost Machinery Corp., 742 F.2d 786, 792 n.7 (3d Cir. 1984) (Rule 9(a) applies only to fraud elements of RICO), *cert. denied*, 469 U.S. 1211 (1985), with Emery v. American General Finance Inc., 71 F.3d 13113, 13118 (7th Cir. 1995) (to show RICO violation details of third party fraud must be plead; amendment, not dismissal proper), and Miller v. Gain Fin. Inc., 995 F.2d 706, 709 (7th Cir. 1993) (third-party transactions must be detailed; only such transactions may be considered), and Farlow v. Peat, Marwick, Mitchell & Co., 956 F.2d 982, 988-89 (10th Cir. 1992) (details of claim, even involving third parties, must be known before filing; Rule 9(b) applies to all RICO elements).

115. See, e.g., S.Q.K.F.C., Inc. v. Bell Atlantic Tricon Leasing Corp., 84 F.3d 629 (2d Cir. 1996) (RICO mail fraud; pleadings include documents attached; difference in sample guarantee and one used not fraudulent to reasonable consumer under Rule 9); Midwest Grinding Co. v. Spitz, 976 F.2d 1016, 1020 (7th Cir. 1992) (the complaint, at a minimum, must describe the predicate acts with some specificity and "state the time, place, and content of the alleged communications perpetrating the fraud") (quoting Graue Mill Dev. Corp. v. Colonial Bank & Trust Co., 927 F.2d 988, 992 (7th Cir. 1991)); Uni\*Quality, Inc. v. Infotronx, 974 F.2d 918 (7th Cir. 1992) (same); Tel-Phonic Servs., Inc. v. TBS Int'l, Inc., 975 F.2d 1134, 1139 (5th Cir. 1992) (Rule 9(b) requires statement of the particulars of "time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby") (quoting 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1297, at 590 (1990)); Cosmas v. Hassett, 886 F.2d 8, 11 (2d Cir. 1989); Schreiber Distrib., 806 F.2d at 1401 (plaintiff must state the time, place, and specific content of the false representations as well as the identities of the parties to the representation); DiVittorio v. Equidyne Extractive Indus., 822 F.2d 1242, 1247 (2d Cir. 1987) ("fraud allegations ought to specify the time, place, speaker, and content of the alleged misrepresentations"); Feinstein v. Resolution Trust Corp., 942 F.2d 34, 42 (1st Cir. 1991) (the pleader is required "to go beyond a showing of fraud and state the time, place and content of the alleged [fraudulent acts]") (quoting New England Data Services, Inc. v. Becher, 829 F.2d 286, 291 (1st Cir. 1987)). See generally, Blakey & Caesar, *supra* MAIN TEXT note 3, at 590 n.239 (extensive collection of district court opinions on pleading fraud with particularity).

dismissal of the complaint.<sup>116</sup> Leave to amend, however, should be granted.<sup>117</sup>

7. *Proving Result for Civil Liability*: While the offense of mail fraud does not require that property be obtained from the victim, when it is combined with RICO's "injury to business or property" and its "by reason of the violation" elements, it may be required.<sup>118</sup> In *Holmes v. Securities Investor Protection Corp.*,<sup>119</sup> following antitrust precedent, the Court held that the "by reason of" clause in 18 U.S.C. § 1964(c) imposed a "proximate cause" burden on a plaintiff, that is, a showing that his or her injury was not only caused in fact, but "proximately" caused by the violation. In *Holmes*, the Court followed the direct/indirect rule of the common law, excluding injury to the customer of a brokerage suffered by reason of injury through a stock manipulation scheme to the brokerage, but leaving open a possible suit for injury directly suffered by reason of a stock parking scheme that defrauded the regulatory process where the scheme that extended the life of the brokerage and magnified the customer's injury.<sup>120</sup> The direct/indirect distinction is reflected in various decisions of the circuit courts of appeals before and after *Holmes*.<sup>121</sup>

The circuits are split, however, on whether to require "reliance" to show proximate cause where fraud is an element of the predicate offense. They are also split on whether to require the plaintiff to be the "target" of the fraud and the person from whom property was obtained ("convergence"). If a false statement is not required for liability, requiring reliance, target, or convergence for proximate cause is unintelligible. The requirement of reliance, target, or convergence as a necessary, as well as sufficient, element of proximate cause conflates the subset of "scheme to defraud" that include a misrepresentation with the set itself that is not limited to those "schemes to defraud" that include a misrepresentation.<sup>122</sup> Because

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116. *Alan Neuman Prods., Inc. v. Alright*, 862 F.2d 1388, 1392 (9th Cir. 1988), *cert. denied*, 493 U.S. 858 (1989).

117. *Luce v. Edelstein*, 802 F.2d 49, 56 (2d Cir. 1986); *Sun Sav. & Loan Ass'n v. Dierdoff*, 825 F.2d 187, 190 (9th Cir. 1987) (abuse of discretion to deny).

118. 18 U.S.C. § 1964(c) (1994).

119. 503 U.S. 258, 268 (1992). *See generally* Stephen Scallan, *Proximate Cause Under RICO*, 20 S. ILL. U. L.J. 455 (1996) (sharp critique of *Holmes* and survey of decisions).

120. *Id.* at 268 n.19.

121. *See, e.g., Lewis ex. rel. American Express Co. v. Robinson*, 39 F.3d 395, 400 (2d Cir. 1994) (injury to corporation by fraud on third party not cognizable in derivative suit); *GICC Capital Corp. v. Technology Fin. Group*, 30 F.3d 289, 293 (2d Cir. 1994) (fraud on creditor of looted corporation directly injured); *Manson v. Stacescu*, 11 F.3d 1127, 1131-32 (2d Cir. 1993) (fraud on corporation not cognizable by suit by shareholder), *cert. denied*, 115 S. Ct. 292 (1994); *Ceribelli v. Elghanayan*, 990 F.2d 62, 64-65 (2d Cir. 1993) (fraud on cooperative cognizable by purchaser of ownership if directly induced to buy) (citing *Holmes*, 503 U.S. at 268 n.19); *In re EDC, Inc.*, 930 F.2d 1275, 1279 (7th Cir. 1991) (fraud on PBGC, the primary target, cognizable by creditor, if secondary target); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1100-01 (2d Cir. 1988) (fraud on creditor of bankrupt cognizable because directly injured), *cert. denied*, 490 U.S. 1007 (1989).

122. *See generally*, Chetty, *supra* MAIN TEXT note 3, at 272-388:

In a misguided attempt to narrow the proper scope of the federal mail fraud statute, as it is being implemented through civil RICO, courts are ignoring the plain meaning of the statute. The courts

"reliance" is not an essential aspect of "by reason of" for other predicate offenses, it is not an essential element of proximate cause for "scheme to defraud."<sup>123</sup> The "target" approach echoes the common law rule of *Peek v. Gurney*, in which Lord Cairns held that one who makes a representation is responsible only to those whom he desired to influence by the representation in the fashion that occasioned the injury.<sup>124</sup> Not all decisions under RICO or the common law follow either rule strictly.<sup>125</sup> Under RICO, courts also give the "by reason of" element a particularly narrow interpretation in the area of loss of employment.<sup>126</sup> That same narrow

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are incorrectly looking to the jurisprudential assumptions underlying the common-law crime of obtaining money by false pretenses and the common-law tort of deceit as means to restrict mail fraud in the civil RICO context.

*Id.* at 393.

123. *See, e.g.*, *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 258-62 (2d Cir. 1995) (RICO fraud; neither reliance nor convergence; statement made to possible customers); *Raybestos Prods. Co. v. Younger*, 54 F.3d 1234 (7th Cir. 1995) (Indiana RICO; intimidation); *Terminate Control Corp. v. Horowitz*, 28 F.3d 1335, 1345-46 (2d Cir. 1994) (RICO extortion); *Cox v. Administrator United States Steel & Carnegie*, 17 F.3d 1386, 1399 (11th Cir. 1994) (RICO bribery). For civil RICO cases requiring reliance, see *Ideal Dairy Farms Inc. v. John Labatt Ltd.*, 90 F.3d 737, 1996 U.S. App. Lexis 18267\*21 (3d Cir. July 24, 1996) (RICO and N.J. RICO; no predicate act of fraud; even so, if plaintiff knew of lack of compliance with contract no reliance for fraud); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1311 (2d Cir. 1990); *Brandenburg v. Seidel*, 859 F.2d 1179, 1188 n.10 (4th Cir. 1988); *Central Distribs. Inc. v. Conn.*, 5 F.3d 181, 183-84 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 2678 (1994); *Flowers v. Continental Grain Co.*, 775 F.2d 1051, 1054 (8th Cir. 1985); *MIGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504-09 (9th Cir. 1986); *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 892 (10th Cir. 1991); *Pelletier v. Zweifel*, 921 F.2d 1465, 1499 (11th Cir. 1991), *cert. denied*, 502 U.S. 855 (1991). For cases applying either "target" or "convergence," see *Abrams v. Young & Republican Inc.*, 79 F.3d 234, 237-39 (2d Cir. 1996); *Israel Travel Advisory Service, Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1258 (7th Cir. 1995) (RICO; mail fraud; victim must be within "zone of interests" under *Holmes*); *In Re American Express Co. Shareholder Litig.*, 39 F.3d 395, 399-400 (2d Cir. 1994); *In re EDC*, 930 F.2d at 1279-80 (applying broad definition of "target"); *Pelletier*, 921 F.2d at 1499 (applying narrow definition of "target"); *Corcoran v. American Plan Corp.*, 886 F.2d at 16, 20 (2d Cir. 1989) (noting "convergence" theory); *United States v. Lew*, 875 F.2d 219, 221 (9th Cir. 1989) (dictum); *United States v. Shelton*, 848 F.2d 1485, 1495 (10th Cir. 1988) (dictum); *Lifschultz Fast Freight Inc. v. Consolidated Freightways Corp.*, 805 F. Supp. 1277, 1294 (D.S.C. 1992), *aff'd*, 998 F.2d 1009 (4th Cir. 1993); *Flowers*, 775 F.2d at 1094. *See generally* *Field v. Mans*, 116 S. Ct. 437, 445-46 (1995) (11 U.S.C. § 523(a)(2) (no discharge in bankruptcy for money property etc. "obtained by" fraud); actual and justifiable reliance required as under common law). Even if reliance is required, it need only be general reliance in scheme, not necessarily all aspects of it. *Chisolm v. TransSouth Financial Corp.*, 1996 U.S. App. Lexis 23877 (4th Cir. Sept. 10, 1996) (RICO mail fraud; fraudulent notices of resale; reliance on legitimacy of process sufficient).

124. L.R. 6 Eng. & In. App. 377 (1873). *Peek* is analyzed in Paige Keeton, *The Ambit of Fraudulent & Representor's Liability*, 17 TEX. L. REV. 1 (1938); *see also* WILLIAM PROSSER & PAIGE KEETON, TORTS 744 (5th ed. 1984) (case collected).

125. *See, e.g.*, *Taffet v. Southern Co.*, 930 F.2d 847, 857 (11th Cir. 1991) (fraud on utility gives rise to RICO claim by rate payers), *vacated on other grounds en banc*, 958 F.2d 1514 (11th Cir.), *cert. denied*, 113 S. Ct. 657 (1992); *Environmental Tectonics v. W. S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1067 (3d Cir. 1988) (fraud on government gives rise to RICO claim by losing bidder), *aff'd on other grounds*, 493 U.S. 400 (1990); *see also* *Bohannon v. Wachovia Bank & Trust Co.*, 188 S.E. 390 (N.C. 1936) (testator deceived into disinheriting plaintiff); *Mitchell v. Langley*, 85 S.E. 1050 (Ga. 1915) (holder of life insurance policy fraudulently induced to change beneficiaries); *Schmuck*, 489 U.S. at 711-12 (mail fraud prosecution upheld where misrepresentation not made to individual who suffered loss); *Blakey & Caesar*, *supra* text note 3, at 571, n.194, 587 n.238 (deceit jurisprudence developed in atmosphere of discredited laissez faire and caveat emptor; inapplicability of common law limitations).

126. *See, e.g.*, *Willis v. Lipton*, 947 F.2d 998, 1001 (1st Cir. 1991) (RICO: no); *Kramer v. Bachan Aerospace, Corp.*, 912 F.2d 151, 155 (6th Cir. 1990) (RICO: no); *O'Malley v. O'Neil*, 887 F.2d 1557, 1561 (11th Cir. 1989)

construction is not always followed in the antitrust area.<sup>127</sup>

8. *Pleading Fraud: Steering Between Rule 11 and Rule 15*: Plaintiffs must be careful when drafting RICO complaints, particularly where fraud is involved. Under Fed. R. Civ. P. 11, they must allege only those legal theories and facts that are based on a reasonable investigation of the law and the facts. If they file without a RICO allegation, hope to resolve factual issues in discovery, and try to add a RICO allegation later, they run the substantial risk that a court will deny their motion to amend under the Fed. R. Civ. P. 15. If they take a chance and allege the facts necessary to establish a RICO violation before they can flesh them out in discovery, Rule 11 sanctions are a likely prospect. The proper balance between Rule 11 and Rule 15 is difficult to strike. Nevertheless, courts manifest little sympathy for the tight place in which potential RICO plaintiffs often find themselves.

Fed. R. Civ. P. 8(a)(2) requires, of course, only a short, plain statement of the facts and legal theories that make up a claim for relief.<sup>128</sup> "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."<sup>129</sup> RICO claims often include fraud allegations.<sup>130</sup> The validity of RICO claims are tested against Fed. R. Civ. P. 12.<sup>131</sup> Civil RICO litigation is subject to Fed. R. Civ. P. 11's certification requirement; all papers or motions must be signed by the attorneys or the parties involved, and those signatures affirm that a

(RICO: no), *cert. denied*, 496 U.S. 926 (1990); *Bowman v. Western Auto Supply Co.*, 985 F.2d 383, 338 (8th Cir. 1993), *cert. denied*, 113 S. Ct. 2459 (1993); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 23-24 (2d Cir. 1980) (RICO: no) *Nodine v. Textron, Inc.*, 819 F.2d 347, 348 (1st Cir. 1987) (RICO: no); *Pujol v. Shearson/Am. Express, Inc.*, 829 F.2d 1201, 1207 (1st Cir. 1987) (RICO: no).

127. *Compare* *Ashmore v. Northeast Petroleum Div.*, 843 F. Supp. 759 (D. Me. 1994) (antitrust: yes), *with* *Adams v. Pan America World Airways*, 640 F. Supp. 683, (D.C. 1986) (antitrust: no), *aff'd*, 828 F.2d 24 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 934 (1988), *and* *Costner v. Blount Nat'l Bank*, 578 F.2d 1192 (6th Cir. 1978) (car dealer required to sell percentage of auto installment paper to bank standing to sue for antitrust tying, even though minimal showing of damage to business of selling cars).

128. *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957) ("all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon it rests.").

129. *Id.*, 355 U.S. at 45-46.

130. *See, e.g.*, *Emery v. American General Finance, Inc.*, 71 F.3d 1343, 1348 (7th Cir. 1995) (RICO; loan company involved in fraudulent loan "flipping" sued by victim of the practice); *Farlow v. Peat, Marwick, Mitchell & Co.*, 956 F.2d 982, 989-90 (10th Cir. 1992) (RICO; misrepresentations concerning "worthless shell" partnerships as valuable commodities leads to suit); *Vild v. Visconsi*, 956 F.2d 560, 567 (6th Cir. 1992) (RICO; misrepresentations concerning start-up capital for real estate marketing plan induces plaintiff to enter sole marketing agreement, allegedly injuring his interests).

131. *National Organizations of Women v. Scheidler*, 114 S. Ct. 798, (1994) (RICO; "at the pleading stage, general factual allegations of injury. . . suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim") (quoting *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2137 (1992)); *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 249-50 (1989) (RICO; "we may only affirm the dismissal of the complaint if 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'") (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (*citing Conley*)).

good-faith inquiry was made into the law and facts.<sup>132</sup> Indeed, courts scrutinize RICO complaints more closely than those in other types of civil suits.<sup>133</sup> When a complaint does not state a claim for which relief may be granted, it will be dismissed under Fed. R. Civ. P. 12(b)(6).<sup>134</sup> When a court determines that a genuine issue of material fact is not present, a Fed. R. Civ. P. 56 motion for summary judgment will be granted.<sup>135</sup> The Supreme Court's summary judgment

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132. *Willy v. Coastal Corporation*, 503 U.S. 131, 135 fn. 1 (1992)(stating that

The signature constitutes a certificate by the signer that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.).

133. *See, e.g., Smith v. Our Lady of the Lake Hospital*, 960 F.2d 439, 444 (5th Cir. 1992)(RICO; doctor, dismissed because of high mortality rate, sued under RICO; Given the resulting proliferation of civil RICO claims and the potential for frivolous suits in search of treble damages, greater responsibility will be placed on the bar to inquire into the factual and legal bases of potential claims or defenses prior to bringing such suit or risk sanctions for failing to do so.)(quoting *Chapman & Cole v. IteL Container Int'l B.V.*, 865 F.2d 676, 685 (5th Cir.), cert. denied, 493 U.S. 872 (1989)). The obligation imposed by Rule 11 is not continuing, that is, a complaint not in violation of Rule 11 does not become such by subsequent events. *O'Ferrel v. Trebol Motors Corp.*, 45 F.3d 561, 563 (1st Cir. 1995)(issue not decided; decisions collected).

134. *See, e.g., Chang v. Chen*, 80 F.3d 1293, 1295-96 (9th Cir. 1996) (RICO; fraudulent land transactions involving 'straw men,' inflated prices, and large escrow deposits; suit by defrauded investors dismissed, since group lacking structure not "enterprise"); *Burnette v. Lockheed Missiles & Space Company*, 72 F.3d 766, 767 (9th Cir. 1996) (RICO; 'altercation' leads to RICO suit plaintiff admits pursued solely for treble damages, and wholly without merit; Rule 11 sanctions imposed and case dismissed because of "baseless arguments"); *Emery*, 71 F.3d at 1345 (appeals court rules dismissal of complaint proper because predicate acts of fraud not pleaded with particularity, but dismissal of suit was improper without amendment); *Lewis v. Robinson*, 39 F.3d 395, 398 (2d Cir. 1994) (RICO; alleged plot by American Express officer to defame rival; shareholder derivative action; dismissed, since no standing to complaint of injury to third party); *Gasoline Sales, Inc. v. Aero Oil Company*, 39 F.3d 70, 71-73 (3d Cir. 1994) (RICO; defendant's misrepresentations induced plaintiff to enter into gas station lease agreement; dismissed, since corporation "cannot be a defendant under section 1962(c) for conducting an 'enterprise' consisting of its own subsidiaries or employees, or consisting of the corporation itself in association with its subsidiaries or employees."); *Barrett v. Tallon*, 30 F.3d 1296, 1298-99 (10th Cir. 1994) (RICO; conspiracy against plaintiff to entrust cattle to defendants, who then sold them without plaintiff's consent; dismissed because no attempt to accurately plead "pattern" or "enterprise"); *New Beckley Mining Corporation v. International Union, United Mine Workers of America*, 18 F.3d 1161, 1163 (4th Cir. 1994) (RICO; selective strike by union; suit by mining company; dismissed, since association in fact of defendants not proper); *Manson v. Stacescu*, 11 F.3d 1127, 1129 (2d Cir. 1993) (RICO; pattern of bribery, extortion, money laundering, fraud and conspiracy; dismissed because plaintiffs, as fifty percent shareholder, did not have standing); *Confederate Memorial Association, Inc. v. Hines*, 995 F.2d 295, 297-300 (D.C.Cir. 1993) (RICO; organization sued white supremacist group over alleged takeovers of Southern pride groups; dismissed because injury alleged improperly, as well as failure to allege a separate enterprise and RICO defendant); *Farlow*, 956 F.2d at 984; *Vild*, 956 F.2d at 564; *Ryan v. Clemente*, 901 F.2d 177, 178 (1st Cir. 1990) (RICO; police department exam-stealing scandal; state officials sued for failure to act; dismissed, since complaint failed to properly allege association or participation, as well as state officials and members of scandal did not share a common purpose); *O'Malley v. New York City Transit Authority*, 896 F.2d 704, 705 (2d Cir. 1990) (RICO; transit employee's termination because of alleged backlash against injury claim; dismissed, since complaint amounted to no more than a wrongful termination claim, and predicate acts alleged did not fall within RICO).

135. *Matsushita Electronic Industrial Co. v. Zenith Radio Corp.*, 495 U.S. 574, 582 (1986); *Celotex Corp. v. Catrell*, 477 U.S. 317, 232 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).



trilogy is applicable to RICO.<sup>136</sup> Plaintiff is entitled to notice of issues to be decided and an opportunity to respond.<sup>137</sup> Similarly, a full opportunity for discovery is required.<sup>138</sup> In contrast, the issue of state of mind should usually be resolved by a jury.<sup>139</sup>

If the court determines that attorneys or parties made a certification in bad faith, or without proper investigation, sanctions will be imposed.<sup>140</sup> Before the 1993 amendments to Rule 11, sanctions were mandatory, and circuit courts remanded appeals, so that the district court could apply sanctions.<sup>141</sup> Circuit courts of appeals review the imposition of sanctions for abuse of discretion.<sup>142</sup>

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136. See, e.g., *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1395-96 (11th Cir. 1994) (RICO; union members sue union and employer for bargaining improprieties; dismissal for failure to state a claim reversed, because a "pattern" could be established through the evidence, the employer could be both the "enterprise" and the "person," and proximate causation was present), *cert. denied*, 115 S. Ct. 900 (1995); *Avirgan v. Hull*, 932 F.2d 1572, 1577 (11th Cir. 1991) (RICO; journalists bring suit alleging conspiracy between mercenaries, CIA, and drug dealers; dismissed, since much of the evidence was inadmissible and plaintiffs failed to show proximate causation), *cert. denied*, 112 S. Ct. 913 (1992).

137. *Celotex*, 477 U.S. at 326; *Rose v. Bartle*, 871 F.2d 331, 340 (3rd Cir. 1989) (RICO: conversion of Rule 12 to Rule 56 requires notice, opportunity to respond, and hearing.).

138. *Anderson*, 477 U.S. at 257; *Shook v. Trust Co. of Ga. Bk. of Savannah*, 859 F.2d 865, 869-71 (11th Cir. 1988) (RICO; failure to permit adequate discovery precluded summary judgment).

139. *Compare California Architectural Building Products Inc. v. Franciscan Ceramics Inc.*, 818 F.2d 1466, 1471 (9th Cir. 1987) (RICO; summary judgment granted on weak circumstantial evidence of intent to defraud), with *Cox*, 17 F.3d at 1400 (not grant summary judgment on issue of RICO state of mind), and *Velten v. Regis B. Lippert Interact Inc.*, 985 F.2d 1515, 1522-24 (11th Cir. 1993) (similar). See also *Terry A. Lambert Plumbing, Inc. v. Western Security Bank*, 934 F.2d 976, 979 (8th Cir. 1991) (RICO; improper handling of loan transaction and resulting default leads debtor to RICO suit; dismissed, since "pattern" insufficiently alleged); *Avirgan*, 932 F.2d at 1576.

140. *Burnette*, 72 F.3d at 767 (bad faith); *Barrett*, 30 F.3d at 1299 (bad faith); *Confederate Memorial*, 995 F.2d at 298 (reasons not specified); *Brandt v. Schal Associates, Inc.*, 960 F.2d 640, 640 (7th Cir. 1992) (RICO; costly construction modifications and "backcharges" destroy profits for plaintiff; court finds that plaintiff "concocted" a claim in bad faith); *Smith*, 960 F.2d at 443 (bad faith); *Ryan*, 901 F.2d at 178 (improper investigation).

141. See, e.g., *O'Malley*, 896 F.2d at 709-10.

142. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 399-405 (1990) (split in circuits resolved; abuse of discretion applies to review of sanction, fact and law in application of Rule 11); *Burnette*, 72 F.3d at 767; *Barrett*, 30 F.3d at 1301; *Confederate Memorial Association*, 995 F.2d at 300; *Brandt*, 960 F.2d at 645; *Smith*, 960 F.2d at 444; *Vild*, 956 F.2d at 570; *Terry A. Lambert Plumbing*, 934 F.2d at 985; *Ford Motor Company v. Summit Motor Products, Inc.*, 930 F.2d 277, 289 (3d Cir. 1991) (RICO; copyright violation charge by Ford leads to RICO counterclaim on grounds of violation of federal court divestiture order of certain designs, as well as wire and mail fraud; dismissed, since court determined divestiture order was not violated, and therefore no predicate act or injury); see also *Lebovitz v. Miller*, 856 F.2d 902, 904 (7th Cir. 1988) (RICO; sanction reversed and cross sanctions denied); *Beeman v. Fiester*, 852 F.2d 206, 209-10, 211-12 (7th Cir. 1989) (RICO sanctions not imposed, since not improper purpose: need not know all the facts; if seek to modify law, must identify it); *Fred A. Smith Lumber Co. v. Medical Emergency Services Associations v. Foulke*, 844 F.2d 391, 398-400 (7th Cir. 1988) (RICO; negligent inclusion of defendants warrants Rule 11 sanctions); *Flip Side Productions, Inc. v. Jam Productions, Ltd.*, 843 F.2d 1024, 1037 (7th Cir. 1988) (RICO; Rule 11 sanctions upheld); *Creative Bath Products, Inc. v. Comm. General Life Ins. Co.*, 837 F.2d 561, 564 (2d Cir. 1987) (RICO; change in law precludes Rule 11 sanctions); *United Energy Owners Committee, Inc. v. United States Energy Management Systems, Inc.*, 837 F.2d 356, 364-65 (9th Cir. 1988) (RICO; Rule 11 standard of review (1) facts: clearly erroneous (2) law de novo (3) sanction: abuse of discretion; no sanctions for failure to remove writ); *Lisak v. Mercantile Bancorp.*, 834 F.2d 668, 672 (7th Cir. 1987) (RICO; close scrutiny where lack of specifics and high ration of certitude of citation); *Aetna Casualty & Surety Co. v. Fernandez*, 830 F.2d 952, 956-57 (8th Cir. 1987) (RICO; RICO suit filed after period of

Sanctions may include an injunction,<sup>143</sup> the posting of security for costs,<sup>144</sup> or prior review by court before processing.<sup>145</sup> District courts must express the reasoning behind their decisions regarding sanctions; if they do not, circuit courts will remand the case.<sup>146</sup> A circuit court may also remand if it decides that abuses at trial warrant sanctions.<sup>147</sup> Circuit courts will also reverse a district court if the complaint was a good faith argument based on existing law, or if the sanctions imposed were too high.<sup>148</sup>

Fed. R. Civ. P. 15, on the other hand, was designed to give parties an opportunity to resolve litigation on the merits, and not on procedural technicalities. Under *Conley*, pleading is not a game of skill in which one misstep is decisive.<sup>149</sup> Leave to amend is to be freely given under *Foman v. Davis*.<sup>150</sup> A request for amendment

limitations ran merits Rule 11 sanctions: due diligence for fraud); *LaVay Corp. v. Dominion Federal Savings & Loan Ass'n.*, 830 F.2d 527, 528 (4th Cir. 1987) (RICO; granting directed verdict not necessarily warrant Rule 11 sanction, but plaintiff still required to make record showing of reasonable basis for suit); *Davis v. A.G. Edwards & Sons, Inc.*, 823 F.2d 105, 108 (5th Cir. 1987) (RICO; unsettled law on statute of limitation precludes Rule 11); *Greenberg v. Gibson*, 822 F.2d 882, 885 (9th Cir. 1987) (RICO; Rule 11 sanctions improper merely for fact error: affidavits of experts used to evaluate compliance); *Triputo v. First National Bank & Trust*, 821 F.2d 1368, 1370 (9th Cir. 1987) (RICO; may deny right to proceed in forma pauperis under RICO where apparently frivolous or without merit); *Caldwell v. Palmetto State Savings Bank of S.C.*, 811 F.2d 916, 919 (5th Cir. 1987) (RICO; Rule 38 sanctions applied to RICO on appeal); *Ferguson v. M. Bank Houston N.A.*, 808 F.2d 358 (5th Cir. 1986) (RICO; Rule 38 and other authority: frivolous appeal sanctioned); *Spiegel v. Continental Illinois National Bank*, 790 F.2d 638, 650-51 (7th Cir. 1986), cert. denied, 107 S. Ct. 579 (1986) (RICO; Rule 38 sanctions applied to RICO on appeal); *Gordon v. Heimann*, 715 F.2d 531 (11th Cir. 1983) (RICO; bad faith counsel fees in RICO inherent power, Rule 11 and 28 U.S.C. § 1927).

143. *Ferguson v. Bank Houston, N.A.*, 808 F.2d 358, 360 (5th Cir. 1986) (RICO; debtor sues bank for holding only five percent of his loan as a credit reserve, thereby allegedly making his loan improper; dismissed and sanctioned because frivolous and "irrational"); *Damiani v. Davis*, 657 F. Supp. 1409, 1419-20 (S.D. Cal. 1987) (injunction and fee Rule 11)(RICO; vendor and purchaser of mining property sue, alleging conspiracy to deprive them of the property; summary judgment granted and sanctions awarded because defendants forced to contest the same frivolous claims several times).

144. *Zerman v. E.F. Hutton and Co., Inc.*, 628 F. Supp. 1509, 1513 (S.D. N.Y. 1986) (RICO; plaintiff alleges misrepresentations concerning purchases of securities; leave to amend to include RICO claim denied and sanctions imposed, because predicate acts improperly alleged and "[t]he Zermans have established a pattern of bringing meritless, unfounded, extravagant and unsupported claims.").

145. *Elmore v. McCammon*, 640 F. Supp. 905, 910-12 (S.D. Tex. 1986) (RICO; complaint alleges improprieties in a foreclosure sale; RICO claim dismissed because "pattern" improperly alleged; sanctions imposed because complaint was "utterly frivolous and without merit," "nonsensical").

146. *Confederate Memorial Association*, 995 F.2d at 301; *Vild*, 956 F.2d at 571.

147. *NCNB National Bank of North Carolina v. Tiller*, 814 F.2d 931, 941 (4th Cir. 1987)(RICO; alleged misuse of term "prime rate" in a loan transaction leads to suit; "[g]iven the clear absence of a legal or factual basis for this appeal, we are left with the opinion that appellants' counsel may have violated Fed.R.Civ.P. 11 by filing the claims below.").

148. *Barrett*, 30 F.3d at 1303 (remanded to lower dollar amount of sanctions); *Smith*, 960 F.2d at 444-45 ("Smith's complaint at least arguably was based upon the law as it existed at the time it was filed.").

149. 355 U.S. at 48.

150. 371 U.S. 178 (1962)

If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or undeclared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice

must be made in a proper and timely fashion.<sup>151</sup> When an amendment is granted, it may relate back to the date of the original filing.<sup>152</sup> A grant of leave to amend is not reviewable, but a denial is reviewed for abuse of discretion.<sup>153</sup> In a RICO context, a plaintiff must, of course, allege the elements of RICO correctly. Failure to do so will result in dismissal.<sup>154</sup> *Foman*<sup>155</sup> listed the standard reasons why a Rule 15 amendment should be denied; including undue delay,<sup>156</sup> a failure to cure the previous deficiency,<sup>157</sup> and futility of further amendment.<sup>158</sup> Denial of leave to

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to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be “freely given.”

*Id.* at 182.

151. *Lewis*, 39 F.3d at 402 (stating that

they did not seek leave to replead in the district court in their opposition papers to defendants; motion to dismiss, by way of a formal motion, or by way of a motion for reconsideration or to alter the judgment after the district court dismissed their claims. The district court surely did not abuse its discretion in not sua sponte granting leave to replead)

(citing *Confederate Memorial*, 995 F.2d at 299); see also *Sinay v. Lamson & Session Co.*, 948 F.2d 1037, 1041-42 (6th Cir. 1991) (discretion cannot be abused where no leave to amend is requested); *Aamoni v. Shearson Lehman Hutton*, 929 F.2d 875, 881 (1st Cir. 1991). But see *Cook, Perkiss & Liche, Inc. v. Northern California Collection Services, Inc.*, 511 F.2d 242, 246-47 (9th Cir. 1990) (“a district court should grant leave to amend even if no request to amend the pleading was made. . . [I]t is of no consequence that [plaintiff] did not file a formal motion, accompanied by a proposed amendment, requesting leave. . .”).

152. See, e.g. *Schiavone v. Fortune*, 477 U.S. 21 (1986) (relation back of addition of party not found, since identity of party's for notice not shown; relation back dependent on four factors: (1) addition of party must arise out of conduct in original pleading, (2) party to be brought in must have notice and not be prejudiced (3) party must or should have known of mistake and (4) (2) and (3) must occur with statute of limitations).

153. *Zenith Radio Corp. v. Hazeltine*, 401 U.S. 321, 330 (1971) (antitrust); *DeJesus v. Sears, Roebuck & Co.*, 87 F.3d 65, 71 (2nd Cir. 1996) (RICO; failure to plead domination by parent over subsidiary warranted dismissal without leave to replead); *State of Louisiana v. Litton Mortgage Company*, 50 F.3d 1298, 1300 (5th Cir. 1995) (RICO; excessive escrow deposits in violation of federal law; suit by state on behalf of homeowners; amendment to add RICO claim denied because claim had been previously abandoned and attempt to restore it to the claim represented “bad faith” or “dilatatory motive”); *Lewis*, 39 F.3d at 402; *Gasoline Sales*, 39 F.3d at 73-74; *New Beckley Mining*, 18 F.3d at 1164; *Manson*, 11 F.3d at 1133; *Smith v. Duff and Phelps, Inc.*, 5 F.3d 488, 493 (11th Cir. 1993) (RICO; plaintiff sued under RICO on grounds that company coerced his retirement to increase profits; district court's refusal to revive dismissed RICO claim ruled to be proper because it had languished for three years); *Confederate Memorial*, 995 F.2d at 299; *Farlow*, 956 F.2d at 990; *Warner v. Alexander Grant & Company*, 828 F.2d 1528, 1531 (11th Cir. 1987) (RICO; allegedly false reports concerning failing company's financial health designed to defraud plaintiff and others; dismissed because plaintiff's injury as a shareholder not a proper RICO injury).

154. See, e.g., *Chang*, 80 F.3d at 1299-1301 (improper “enterprise” / “pattern” distinction); *Emery*, 71 F.3d at 1348 (no Rule 9(b) particularity); *Lewis*, 39 F.3d at 399-401 (lack of proximate causation; no “pattern”); *Gasoline Sales*, 39 F.3d at 72-73 (improper “person” / “enterprise” distinction); *New Beckley*, 18 F.3d at 1163-64 (4th Cir. 1994) (use of union as both “person” and “enterprise” improper); *Manson*, 11 F.3d at 1130-33 (no standing or proximate causation); *Confederate Memorial*, 995 F.2d at 298-99 (incorrect injury, no “enterprise” or predicate acts); *Farlow*, 956 F.2d at 989 (no Rule 9(b) particularity); *Warner*, 828 F.2d at 1530-31 (11th Cir. 1987) (incorrect injury).

155. 371 U.S. at 182

156. *Litton Mortgage*, 50 F.3d at 1302-03; *Smith*, 5 F.3d at 493

157. *DeJesus*, 87 F.3d at 72 (no abuse in failure to afford fifth opportunity to amend); *Chang*, 80 F.3d at 1301; *New Beckley*, 18 F.3d at 1164; *Farlow*, 956 F.2d at 982-988.

158. *Lewis*, 39 F.3d at 402; *Gasoline Sales*, 39 F.3d at 73-74; *Manson*, 11 F.3d at 1133; *Confederate Memorial*, 995 F.2d at 299.

amend without a finding of these—or additional defects—is an abuse of discretion.<sup>159</sup>

9. *Pleading RICO Conspiracy*: Pleading conspiracy and enterprise presents difficulties, though the difficulties are different in criminal prosecutions than civil litigation. In short, fraud is not the only difficult issue in pleading RICO. In criminal cases, the courts do not generally impose on RICO conspiracy (or other indictments) any special pleading standards.<sup>160</sup> The Sixth Amendment of the United States Constitution provides: “[i]n all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusations . . . .” Fed. R. Crim. Pro. 7(c)(1) provides: “[t]he indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.” Three purposes are served by the charging instrument: (1) to enable the defendant to make a defense; (2) to protect the defendant from subsequent prosecutions for the same offense; and (3) to permit the court to test the sufficiency of the allegations.<sup>161</sup> A charge in statutory language is sufficient,<sup>162</sup> unless the statute omits an essential element or includes it only by implication; if so, the omitted element must be pled.<sup>163</sup> Likewise, if the statute is drafted in general terms, the charge must be particular.<sup>164</sup> Finally, a charge must negate a statutory exception that is “so incorporated in the language defining the crime that the elements of the offense cannot be accurately described if the exception is omitted.”<sup>165</sup> These rules are routinely applied to RICO indictments.<sup>166</sup> The

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159. See, e.g., *Emery*, 71 F.3d at 1348 (“The district court was . . . right to dismiss the complaint. But had he done so on the basis of Rule 9(b), he would of course have given Emery a chance to amend her complaint to cure what appears to be a merely technical pleading deficiency”); *Warner*, 828 F.2d at 1531 (“Since there is no indication of bad faith or undue delay on Warner’s part, nor any indication of prejudice to Grant, the district court abused its discretion when it dismissed Warner’s RICO claim without leave to amend.”).

160. See, e.g., *United States v. Bagaric*, 706 F.2d 42, 61 (2d Cir.) (“An indictment need only track the language of the statute and, if necessary to appraise the defendant ‘of the nature of the accusations against him’ . . . state time and place in approximate terms.”) (quoting *Russell v. United States*, 369 U.S. 749, 765 (1962)), *cert. denied* 464 U.S. 840 (1983).

161. *United States v. Cruikshank*, 92 U.S. 542, 558 (1876).

162. *Hamling v. United States*, 418 U.S. 87, 117-18 (1974).

163. *United States v. Carll*, 105 U.S. 611, 612-13 (1882) (holding indictment in words of statute insufficient; implied state of mind must be alleged; “the fact that the statute in question, read in light of the common law, and of other statutes on the like matter enables the court to infer the intent of the legislature [as to an element, not express, but to be implied]”).

164. *Russell*, 369 U.S. at 764.

165. 1 CHARLES A. WRIGHT, *FEDERAL PRACTICE AND PROCEDURE (CRIMINAL)* § 125, at 372 (2d ed. 1982) (citing *United States v. Cook*, 84 U.S. 168, 173 (1872)).

166. See, e.g., *Crockett*, 979 F.2d at 1209-10 (holding RICO conspiracy indictment sufficient); *Eufrasio*, 935 F.2d at 575 (RICO indictment may be sufficient if it substantially follows language of the statute, but it is not sufficient if it merely tracks the language with such generality as to “prejudice a defendant in preparing his defense [or] endanger his constitutional guarantee against double jeopardy”); *United States v. Glecier*, 923 F.2d 496, 499 (7th Cir.) (RICO indictment; Rule 7(c)(1) and the Sixth Amendment require (1) elements of offense; (2) informed of the nature of the charge sufficient to defend; and (3) to enable to assert jeopardy; requirements are met by identifying entity and alleging association with), *cert. denied*; 502 U.S. 810 (1991); *United States v. Olantonji*, 872 F.2d 1161, 1166 (3d Cir. 1989) (RICO indictment; “there is sufficient factual orientation to permit the

government, however, must prove what it charges; for example, it must prove the "enterprise alleged," and not another enterprise.<sup>167</sup> That is not to say that in a proper case a bill of particulars under Fed. R. Crim. Pro. 7(f) ought not be ordered.<sup>168</sup> Nor is it to say that Rule 7(c)(2) does not require the specification of property subject to forfeiture; rather the specification may be general with detail provided by a bill of particulars.<sup>169</sup> In civil cases, in contrast, the courts impose special pleading standards on RICO conspiracy and other complaints. Under § 1962(d), a civil conspiracy claim must allege an agreement between the co-conspirators. The circuits uniformly require allegations of RICO conspiracy to possess a detailed factual basis.<sup>170</sup>

10. *Pleading RICO Enterprise in Civil Cases:* An enterprise pleading under RICO in civil cases is tested in the circuit courts of appeal by special, but conflicting, standards.<sup>171</sup> If an enterprise is not identified, the complaint will

defendant to prepare his defense and to invoke double jeopardy in the event of a subsequent prosecution") (quoting *United States v. Rankin*, 870 F.2d 109, 112 (3d Cir. 1989); *Angiulo*, 847 F.2d at 964 (RICO indictment; same); *Cauble*, 706 F.2d at 1333 (RICO indictment; "[a]n indictment is sufficient if it contains the elements of the offense charged, fairly informs the defendant what charge he must be prepared to meet, and enables the accused to plead acquittal or conviction in bar of future prosecutions for the same offense."); see also *United States v. Williams*, 679 F.2d 504, 508 (5th Cir. 1982) (RICO indictment; defendant is entitled to plain, concise statement of essential facts constituting offenses, but the indictment need not set forth every evidentiary detail necessary to establish the elements of the offense), *cert. denied*, 459 U.S. 1111 (1983); *Diecidue*, 603 F.2d at 547 (RICO indictment; holding that even if statute is generic, indictment must be specific).

167. See, e.g., *United States v. Weissman*, 899 F.2d 1111, 1114-16 (11th Cir. 1990) (reversing conviction because court permitted conviction on uncharged enterprise); *United States v. Lemm*, 680 F.2d 1193, 1198 (8th Cir. 1982) (rejecting government argument that relied on uncharged enterprise), *cert. denied*, 459 U.S. 1110 (1983); see also *Stirone v. United States*, 361 U.S. 212, 217-18 (1960) (finding amendment of indictment improper).

168. See, e.g., *United States v. Davidoff*, 845 F.2d 1151, 1153-54 (2d Cir. 1988) (finding error to decline bill of particulars to specify three extortionate payments not charged or racketeering acts introduced to move existence of enterprise).

169. See, e.g., *United States v. Raimondo*, 721 F.2d 476, 477 (4th Cir. 1983) (general indictment sufficient if bill of particulars is detailed), *cert. denied*, 469 U.S. 837 (1984); *United States v. Boffa*, 688 F.2d 919, 939 (3d Cir. 1982) (same), *cert. denied*, 460 U.S. 1022 (1983); *United States v. Grammatikos*, 633 F.2d 1013, 1024-28 (2d Cir. 1980) (same).

170. See, e.g., *Schiffels*, 978 F.2d at 352 (holding complaint deficient where conspiracy facts are not pled); *Tel-Phonic Servs.*, 975 F.2d at 1140 (holding conspiracy allegations deficient because "the complaint [did] not allege facts implying any agreement"); *Glessner v. Kenny*, 952 F.2d 702, 714 (3d Cir. 1991) ("complaint alleges no facts to support an allegation of agreement and knowledge"); *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 48 (1st Cir. 1991) (holding conspiracy claim deficient; it was "perfunctory," "alleged in wholly conclusory terms," and it failed to "provide any specifics as to the details of the alleged conspiracy"); *Danielsen*, 941 F.2d at 1232 (failure to allege elements of conspiracy and facts supporting allegations rendered RICO complaint deficient); *Craighead v. E.F. Hutton & Co.*, 899 F.2d 485, 495 (6th Cir. 1990) (holding RICO complaint deficient because plaintiffs only pled the "conclusory allegation that the defendants 'conspired'"); *Hecht*, 897 F.2d at 25 (holding RICO conspiracy claim deficient because "[i]t does not allege facts implying any agreement"); *O'Malley*, 887 F.2d at 1560 ("The plaintiffs' complaint and RICO Case Statement allege at most that some of the defendants knew about O'Neill's activities; there are no facts alleged that would indicate that they were willing participants in a conspiracy."); *Weiszmann v. Kirkland & Ellis*, 732 F. Supp. 1540, 1546 (D. Colo. 1990) ("[A] plaintiff must . . . provide some factual basis for a claim that a defendant conspired with another."); *First Nat'l Bank v. Lustig*, 727 F. Supp. 276, 282 (E.D. La. 1989) ("The complaint and RICO Case Statement contain no allegations that First Financial agreed, with co-conspirators or with any else, to the commission of two predicate acts.").

171. See generally *infra* APPENDIX G (ASSOCIATION IN FACT).

generally be dismissed under Fed. R. Civ. P. 12(b)(6).<sup>172</sup> If it is identified, the decisions are in conflict.<sup>173</sup> Generally, the proof must also conform to the pleading.<sup>174</sup>

11. *Evaluating Special Pleading Rules Under RICO*: Generally, holdings imposing special pleading requirements under RICO cannot be squared with the plain text of the Federal Rules of Civil Procedure, which require only notice pleading and limit the particularity pleading standard to the elements of fraud or mistake.<sup>175</sup> On the other hand, where a complaint implicates activity protected by the First Amendment, the Constitution itself may require more detailed pleadings.<sup>176</sup> This approach is also widely followed.<sup>177</sup> The concurring opinion of Justices Souter and

172. See, e.g., *Otto v. Variable Annuity Life Ins.*, 814 F.2d 1127, 1137 (7th Cir. 1986) (affirming dismissal due to conclusory allegation of conspiracy), *cert. denied*, 486 U.S. 1026 (1988); cf. *Old Time Enters. v. International Coffee Corp.*, 862 F.2d 1213, 1219 (5th Cir. 1989) ("confusing and often meaningless list of asserted enterprises").

173. Compare *McNeil v. Salan*, 1992 WL 102734 at \*\*3 (6th Cir. 1992) ("put defendant on notice"; "function of discovery to fill out details" "trial to establish . . . each element"), and *Seville Indus. Machinery Corp.*, 742 F.2d at 797 n.7 (notice pleading on enterprise does not require matters of proof, including structure; "[T]he district court confused what must be pleaded with what must be proved."), with *Elliott v. Foufas*, 867 F.2d 877, 881 (5th Cir. 1989) (plaintiff must specifically plead elements of enterprise, including separateness; "[P]laintiff must plead specific facts which establish that the association exists for purposes other than simply to commit the predicate acts."), and *Delta Truck & Tractor v. J. I. Case Co.*, 855 F.2d 241, 243 (5th Cir. 1988) (same, including continuity), *cert. denied*, 489 U.S. 1079 (1989), and *Manax v. McNamara*, 842 F.2d 808, 811-12 (5th Cir. 1988) (same, including structure), and *Montesano v. Seafirst Commercial Corp.* 818 F.2d 423, 427 (5th Cir. 1987) (same); see also *Zolfaghari v. Sheikholeslami*, 943 F.2d 451, 453-54 (4th Cir. 1991) (association-in-fact pled without evidence to support it; legitimate business could have been pled but court declined replead allegations for pleader); *Feinstein*, 942 F.2d at 41 (dismissing complaint for absence of allegations tying participants to separate episodes of racketeering activity); *Jennings v. Emry*, 910 F.2d 1434, 1440-41 (7th Cir. 1990) (sufficient allegations of conspiracy, but insufficient allegations of "criminal structure").

174. See *Burdett v. Miller*, 957 F.2d 1375, 1380-81 (7th Cir. 1992) (reversing judgment because district court altered pleaded enterprise without giving the defendant a chance to respond).

175. See Fed. R. Civ. P. 8 ("a short and plain statement of the claim"); Fed. R. Civ. P. 9(b) ("fraud or mistake shall be stated with particularity"); see also *NOW v. Scheidler*, 114 S. Ct. 798, 803 (1994) (standing) ("[We] presume that general allegations embrace those specific facts that are necessary to support the claim.") (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 167 (1993) (civil rights) (Rule 9(b) sets out the only circumstances requiring particularity).

176. See, e.g., *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd.*, 542 F.2d 1076, 1083 (9th Cir. 1976) (antitrust; application of *Noerr-Pennington* doctrine; "The danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations."), *cert. denied*, 430 U.S. 940 (1977).

177. See, e.g., *Oregon Natural Resources Council v. Mohla*, 944 F.2d 531, 533 (9th Cir. 1991) (requiring heightened pleading standard); *Hydro-Tech. Corp. v. Sundstrand Corp.*, 673 F.2d 1171, 1177 n.8 (10th Cir. 1982) (same); *Mark Aero v. Trans World Airlines*, 580 F.2d 288, 297 (8th Cir. 1978) (same); *Letica Corp. v. Sweetheart Cup Co.*, 790 F. Supp. 702, 705-06 (E.D. Mich. 1992) (same); *Cash Energy v. Weiner*, 768 F. Supp. 892, 899 (D. Mass. 1991) (same); *Premier Elec. Constr. Co. v. International Bhd. of Elec. Workers*, 627 F. Supp. 957, 966 (N.D. Ill. 1985) (same), *rev'd sub nom* on other grounds, *Premier Elec. Constr. Co. v. National Elec. Contractors Assoc.*, 814 F.2d 358 (7th Cir. 1987); *St. Joseph's Hosp. v. Hospital Auth.*, 620 F. Supp. 814, 833 & n.22 (S.D. Ga. 1975) (same), *vacated on other grounds*, 795 F.2d 948 (1986); *Spanish Int'l Communications Corp., SIN v. Leibowitz*, 608 F. Supp. 178, 182-84 (S.D. Fla.) (same), *aff'd*, 778 F.2d 791 (11th Cir. 1985); *Caplan v. American Baby*, 582 F. Supp. 869, 871 (S.D.N.Y. 1984) (same; copyright and trademark); *WIXT Television v. Meredith Corp.*, 506 F.

Kennedy in *NOW* also suggests it.<sup>178</sup>

12. *RICO Case Statements*: In addition to special pleading rules for enterprise and conspiracy, the courts often use a device known as "RICO Case Statement" to control RICO litigation.<sup>179</sup> At least three sources are cited as authority for adopting the RICO Case Statement procedure. First, courts refer to Fed. R. Civ. P. 11 as giving them authority to compel the filing of the statement.<sup>180</sup> Second, Fed. R. Civ. P. 12(e) is cited to provide authority for the district courts' actions.<sup>181</sup> Third, because Fed. R. of Civ. Pro. 16 provides trial judges with broad powers to manage the pretrial process, especially in "potentially difficult or protracted actions that may involve complex issues," courts justify their use of RICO Case Statements as an aspect of their power to control pretrial management.<sup>182</sup> Similar orders are also used in the antitrust arena.<sup>183</sup> They are also recommended by the *MANUAL FOR COMPLEX LITIGATION*.<sup>184</sup> Once the order is issued and the statement is filed, it may be used in ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6).<sup>185</sup> The

Supp. 1003, 1035 (N.D.N.Y. 1980) (same); *Newark v. Delmarva Power & Light Co.*, 497 F. Supp. 323, 326-27 (D. Del. 1980) (same); *Gainesville v. Florida Power & Light Co.*, 488 F. Supp. 1258, 1266-67 (S.D. Fla. 1980) (same); *Realco Servs. v. Holt*, 479 F. Supp. 880, 884 (E.D. Pa. 1979) (same); *Federal Prescription Serv. v. American Pharmaceutical Assoc.*, 471 F. Supp. 126, 129 (D.D.C. 1979) (same), *aff'd on other grounds*, 663 F.2d 253 (D.C. Cir. 1981), *cert. denied*; 455 U.S. 928 (1982); *Miller & Son Paving v. Wrightstown Township Civic Ass'n*, 443 F. Supp. 1268, 1273 (E.D. Pa. 1978) (same), *aff'd on other grounds*, 595 F.2d 1213 (3d Cir.), *cert. denied*, 444 U.S. 843 (1979); *Bethlehem Plaza v. Campbell*, 403 F. Supp. 966, 971 (E.D. Pa. 1975) (same).

178. 114 S. Ct. at 807.

179. *See, e.g.*, *Marriott Bros. v. Gage*, 911 F.2d 1105, 1108, 1109-11 (5th Cir. 1990) (plaintiff bound by answer; copy of order set out); *Old Time Enter.*, 862 F.2d at 1217 (holding order proper). RICO case statements are subject to Rule 11. *O'Ferrall v. Trebol Motors Corp.*, 45 F.3d 561, 563 (1st Cir. 1995).

180. *See, e.g.*, *John L. Motley Assoc. v. Rumbaugh*, 97 B.R. 182, 186 (E.D. Pa. 1989) (requiring case statement to be filed); *Kurz v. Mairone*, 1987 WL 28360, at \*4 (E.D. Pa. 1987) (same); *R.M. Perez & Assocs. v. Welch*, 1987 WL 10869, at \*1 (E.D. La. 1987) (same); *Robinson v. Mount Vernon Realty* 1986 WL 22212, at \*1 (D.D.C. 1986) (same).

181. *See, e.g.*, *Old Times Enters.*, 862 F.2d at 1217 (requiring specific facts to be pled); *Landry v. Airline Pilots Ass'n Int'l*, No. 86-3196, 1988 U.S. Dist. LEXIS 2249, at \*2 n.1 (E.D. La. March 17, 1986) (same).

182. *See, e.g.*, *United Power Ass'n v. L.K. Comstock & Co.*, 891 F.2d 533 (5th Cir. 1990) (using case statement to determine propriety of sanctions); *Dictor Capital Corp. v. Feingold*, No. 87-4623, 1988 U.S. Dist. LEXIS 3108, at \*1 (E.D. Pa. April 11, 1988) (same); *see generally* N.Y. STATE BAR ASS'N COMMERCIAL & FED. LITIG. SEC., *THE CIVIL RICO CAST STATEMENT* (1989) (discussing case statements); *RICO BUS. DISPUTES GUIDE* (CCH) ¶7453 (May 1990) (same).

183. *See, e.g.*, *Von Poppenheim v. Portland Boxing & Wrestling Comm.*, 442 F.2d 1047, 1049-53 (9th Cir. 1971) (requiring particularized statement), *cert. denied*, 404 U.S. 1039 (1972).

184. § 21.33 (3d ed. 1995).

185. *See, e.g.*, *Parker & Parsley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580, 584 (5th Cir. 1992) (affirming dismissal); *McLaughlin v. Anderson*, 962 F.2d 187, 189 (2d Cir. 1992) (same); *Glessner*, 952 F.2d at 712 n.9 (same); *Miranda*, 948 F.2d at 44 n.3 (same); *Kramer*, 912 F.2d at 153 (same); *O'Malley*, 887 F.2d at 1559 (same); *Old Times Enters.*, 862 F.2d at 1216 (same); *Michaels Bldg. Co.*, 848 F.2d at 677 (reversing dismissal); *Queen Village Pharmacy v. American Federation of State, County & Mun. Employees Dist. Council 33*, 1992 WL 25778, at \*1 (E.D. Pa. 1992) (granting 12(b)(6) motion); *Aloe Coal Co. v. International Union, United Mine Workers of Am.*, No. 91-1981, 1992 U.S. Dist. LEXIS 21922, at \*3 (W.D. Pa. Dec. 8, 1992) (same); *Hunt v. Gouverneur Townhouse Partners—1988, L.P.*, 1991 WL 253126, at \*1 (S.D.N.Y. 1991) (denying Rule 12(b)(6) motion); *Sheperd v. American Honda Motor Co.*, 822 F. Supp. 625, 629 n.1 (N.D. Cal. 1993) (granting Rule 12(b)(6) motion); *Cardwell v. Sears Roebuck & Co.*, 821 F. Supp. 406, 407 (D.S.C. 1993) (same); *W.E. Darin Const.*

statement may also be used ruling on a motion for summary judgment under Fed. R. Civ. P. 56.<sup>186</sup> RICO Case Statements may also be used in assessing whether Fed. R. Civ. P. 11 sanctions should be imposed.<sup>187</sup>

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*Enters. v. Detroit Coke Co.*, 814 F. Supp. 325, 330 (W.D.N.Y. 1993) (same); *Casper v. Paine Webber Group*, 787 F. Supp. 1480, 1492 (D. N.J. 1992) (same); *Chartrand v. Chrysler Corp.*, 785 F. Supp. 666, 668 (E.D. Mich. 1992) (same); *Jeffreys v. Exten.*, 784 F. Supp. 146, 157 (D. Del. 1992) (same).

186. See, e.g., *Dennis v. Gen. Imaging*, 918 F.2d 496, 510 (5th Cir. 1990) (affirming summary judgment); *Marriott Bros.*, 911 F.2d at 1106 (same); *Landry v. Air Line Pilots Ass'n Int'l*, 901 F.2d 404, 426 n.72 (5th Cir.) (reversing summary judgment), *cert. denied*, 498 U.S. 895 (1990); *Meridian Mortg. Corp. v. Spivak*, 1993 WL 193364, at \*1 (E.D. Pa. 1993) (granting summary judgment); *Franks v. O'Connor Corp.*, 1992 WL 301266, at \*1 (E.D. Pa. 1992) (same); *BML Group v. U.S. Pizza*, 1992 WL 220946, at \*1 (E.D. Pa. 1992) (same); *Porter v. Shearson Lehman Bros.*, 802 F. Supp. 41, 53 (S.D. Tex. 1992) (same); *Delta Pride Catfish v. Marine Midland Business Loans*, 767 F. Supp. 951, 968 (E.D. Ark 1991) (same).

187. See, e.g., *Smith v. Our Lady of the Lake Hosp.*, 960 F.2d 439, 445 (5th Cir. 1992) (holding that district court abused its discretion in imposing Rule 11 sanctions).



## APPENDIX C (IMPLEMENTATION)

1. *Enactment of RICO*: When Congress enacted the Organized Crime Control Act of 1970,<sup>1</sup> it followed the recommendations of the President's Commission on Law Enforcement and Administration of Justice,<sup>2</sup> which, in turn, were based on work done for the Commission.<sup>3</sup> Three assumptions underwrote those recommendations: the problem of organized crime was finite, it was principally domestic, and its participants were amenable to law enforcement—assumptions that are increasingly not applicable to contemporary problems, including the international organized crime, the international traffic in drugs, and terrorism. The need for new thinking in these areas is manifest. Nevertheless, the 1970 Act was enacted “to strengthen [] the legal tools in the evidence gathering process, . . . [to] establish . . . new penal prohibitions, and [to] provide . . . enhanced sanctions and new remedies.”<sup>4</sup> Congress found that “the sanctions and remedies available” under the law existing in 1970 were “unnecessarily limited in scope and impact.”<sup>5</sup> It then provided a wide range of new criminal and civil sanctions to control these offenses, including imprisonment, forfeiture, injunctions, and treble damage relief for “person[s] injured” in their “business or property” by violations of the statute.<sup>6</sup> At the time, these sanctions were called for by no less than President Richard Nixon.<sup>7</sup>

2. *Use of RICO*: At first, the Department of Justice moved slowly to use RICO in criminal cases. Today, it is the prosecutor's tool of choice in prosecuting sophisticated forms of crime.<sup>8</sup> The Department of Justice is also moving to implement RICO's civil provisions.<sup>9</sup> Since 1970, criminal RICO has been effectively used against organized crime groups,<sup>10</sup> in white-collar crime prosecutions,<sup>11</sup>

1. Pub. L. No. 91-452, 84 Stat. 922 (1970).

2. THE PRESIDENT'S COMM. ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 205-09 (1967).

3. G. Robert Blakey, *Aspects of the Evidence Gathering Process in Organized Crime Cases: A Preliminary Analysis*, in PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME 80 (1967).

4. 84 Stat. at 923.

5. *Id.*

6. 18 U.S.C. §§ 1963, 1964(c) (1994).

7. See *Message on Organized Crime: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 449 (1969); *Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 537 (1970).

8. *Oversight on Civil RICO Suits: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 109-11 (1985) (testimony of Assistant Attorney General Stephen S. Trott).

9. *Id.* at 116-17 (litigation against mob-controlled unions reviewed); see also *infra* APPENDIX E (§ 1962 (A)) (discussing use of RICO in civil actions against unions infiltrated by organized crime).

10. See e.g., *United States v. Salerno*, 868 F.2d 524, 528 (2d Cir.) (“The RICO enterprise alleged in the indictment is an organization known as the ‘Commission’ of La Cosa Nostra, a nationwide criminal society which operates through local organizations known as ‘families.’”), *cert. denied*, 491 U.S. 907 (1989). Compare Selwyn Raab, *Curbing Mob Chiefs*, N.Y. TIMES, Feb. 27, 1985, at B2 (indictment under RICO of nine mob leaders, five of whom sit on the “commission” and are heads of New York City area families), with S. REP. NO. 91-617 at 36-43 (1969) (identifying five of nine individuals later indicted in 1984).

11. See, e.g., *United States v. Marubeni Am. Corp.*, 611 F.2d 763 (9th Cir. 1980).

against violent groups,<sup>12</sup> and against street gangs.<sup>13</sup> RICO is also used as a model for state legislation specifically aimed at street gangs.<sup>14</sup>

3. *Attack Against RICO*: The use of RICO is, however, under attack by a wide range of groups. In use of criminal cases, the principal focus of the attack is on multiparty, extended trials. The Report of the National Association of Criminal Defense Lawyers ("NACDL REPORT") on the "RICO Megatrial" is illustrative.<sup>15</sup> The NACDL REPORT, which cites only 27 allegedly illustrative decisions, is analyzed and rejected, point by point, using a computer-generated study of 900 decisions handed down during the period of the Report.<sup>16</sup>

4. *Effectiveness of RICO*: Independent studies conclude that RICO is effective against sophisticated forms of crime. In fact, the President's Commission on Organized Crime highly praised RICO and recommended that states adopt similar legislation.<sup>17</sup> In its study of federal organized crime prosecutions, the Government Accounting Office (GAO) concluded:

Prior to the passage of [RICO], attacking an organized criminal group was an

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12. See e.g., *United States v. Yarbrough*, 852 F.2d 1522, 1526-28, 1540, 1546 (9th Cir.) (prosecution of "Order" or "Bruders Schweigh," white-hate group, for robbery, murder, etc.), *cert. denied*, 488 U.S. 866 (1988); JAMES COATES, *ARMED AND DANGEROUS: THE RISE OF THE SURVIVALISTS RIGHT* (1987); STEPHEN SINGULAR, *TALKED TO DEATH: THE MURDER OF ALAN BERG AND THE RISE OF THE NEO-NAZIS* (Berkley ed. 1989); John Kifner, *Oklahoma Blast: A Tale in 2 Books?*, N.Y. TIMES, Aug. 21, 1995, at A12 (reporting finding a novel by WILLIAM L. PIERCE, *The Turner Diaries* (1978), and a non-fiction study by James Coates, *ARMED AND DANGEROUS: THE SURVIVALISTS RIGHT* (1987), among the effects of Timothy J. McVeigh and Terry L. Nichols, who are charged with the April 19, 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma, that killed at least 167 people).

13. See *United States v. Thai*, 29 F.3d 785 (2d Cir.) (street gang engaging in murder, robbery, and extortion), *cert. denied*, 115 S. Ct. 456 (1994); James C. McKinley, Jr., *Accounts of Calculated Cruelty in a Bronx Gang*, N.Y. TIMES, Apr. 10, 1995, at B3 (reporting use of RICO in street gang prosecution); Matthew Purdy, *Using the Racketeering Law to Bring Down Street Gangs*, N.Y. TIMES, Oct. 19, 1994 at A1.

14. See, e.g., IOWA CODE ANN. § 723A (1993). See generally Susan W. Brenner, *RICO, CCE and Other Complex Crime: The Transformation of American Criminal Law?*, 2 Wm & Mary Bill of Rights J. 239, 275-76 (1992) (reporting number of states making it an offense to aid or conspire to aid the activity of a "criminal street gangs.").

15. NATIONAL ASS'N OF CRIMINAL DEFENSE LAWYERS, REPORT ON RICO MEGATRIALS (1987) [NACDL REPORT]; see also ABA CRIM. JUSTICE SECTION ON RICO TRIALS, DRAFT REPORT (1988); COMMITTEE ON CRIMINAL ADVOCACY OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK, MEGATRIALS: A REPORT (1988). Compare *United States v. Gallo*, 668 F. Supp. 736 (E.D.N.Y. 1987) (Weinstein, C.J.) (criticizing a RICO indictment of a substantial number of defendants), *aff'd on other grounds*, 863 F.2d 185 (2d Cir. 1988), with *United States v. Casamento*, 887 F.2d 1141, 1151-52 (2d Cir. 1989) (upholding convictions of 21 defendants tried over 17 months on RICO and drug charges and setting standards for complex trials: (1) prosecutor must make a good faith estimate of anticipated length of the case-in-chief; (2) if the length of the trial will exceed four months, the prosecutor must justify it; and (3) such a trial of more than ten defendants must be especially justified), *cert. denied*, 493 U.S. 1081 (1990).

16. G. Robert Blakey, *RICO: The Federal Experience (Criminal and Civil) and an Analysis of Attacks Against the Statute*, in HANDBOOK OF ORGANIZED CRIME IN THE UNITED STATES 457-67 (Robert J. Kelly et. al. eds., 1994).

17. See PRESIDENT'S COMMISSION ON ORGANIZED CRIME, THE IMPACT, ORGANIZED CRIME TODAY 133-35 (1986) (concluding that RICO is one of the most powerful and effective weapons in existence for fighting organized crime).

awkward affair. RICO facilitates the prosecution of a criminal group involved in superficially unrelated criminal ventures and enterprises connected only at the usually well-insulated upper levels of the organization's bureaucracy.

Before the act, the government's efforts were necessarily piecemeal, attacking isolated segments of the organization as they engaged in single criminal acts. The leaders, when caught, were only penalized for what seemed to be unimportant crimes. The larger meaning of these crimes was lost because the big picture could not be presented in a single criminal prosecution. With the passage of RICO, the entire picture of the organization's criminal behavior and the involvement of its leaders in directing that behavior could be captured and presented.<sup>18</sup>

Based on its hearings, the Senate Committee recommended that federal law enforcement agencies "should continue, in appropriate and deserving cases, their innovative and effective use of the enterprise theory of investigation, the task force approach, and the provisions of the RICO statute."<sup>19</sup> Finally, the New York Times, in a special report, *The Mob in Decline*, discussed RICO's utility in the fight against organized crime:

Law-enforcement officials generally credit a long-term strategy adopted by the Justice Department and the Federal Bureau of Investigation in the early 1980's: developing cases against the top leaders of organized-crime families and relying largely on the Racketeer Influenced and Corrupt Organizations Act, or RICO, as a courtroom tool.

By concentrating on enterprises rather than individuals, Federal prosecutors in the last five years have removed the high commands of families through the convictions and long prison sentences of almost 100 top Cosa Nostra leaders.<sup>20</sup>

The mob itself agrees.<sup>21</sup> The most thoughtful, thorough and independent academic

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18. *Organized Crime: 25 Years After Valachi: Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 100th Cong., 2d Sess. 72 (1988) (testimony of David C. Williams, Director of Special Investigations, GAO). See also U.S. Department of Justice Office of Justice Programs, Bureau of Justice Statistics, *Prosecuting Criminal Enterprises*, (Nov. 1993) ("The importance of the criminal enterprise statutes comes from their potential to break up associations of highly placed drug traffickers or to incapacitate criminals who direct complex illegal activities").

19. PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE SENATE COMM. ON GOVERNMENTAL AFFAIRS, *FEDERAL GOVERNMENT'S USE OF THE RICO STATUTE AND OTHER EFFORTS AGAINST ORGANIZED CRIME*, S. REP. NO. 407, 101st Cong., 2d Sess. 31-32 (1990).

20. Selwyn Raab, *The Mob in Decline—A Special Report: A Battered and Ailing Mafia Is Losing Its Grip on America*; N.Y. TIMES, Oct. 22, 1990, at A1 see also Robert D. McFadden, *The Mafia of 1980's: Divided and Under Siege*; N.Y. TIMES, Mar. 11, 1987, at A1 Stewart Panell, *et al.*, *Busting the Mob.*, U.S. NEWS & WORLD REP., Feb. 3, 1986, at 24.

21. See *United States v. Cintolo*, 818 F.2d 980, 984-95 (1st Cir.) (La Cosa Nostra boss Gennaro Angiulo overheard on a bug: "Under RICO, no matter who . . . we are, if we're together, they'll get every . . . one of us."), *cert. denied*, 484 U.S. 913 (1987); see also GERALD O'NEILL & DICK LEHR, *THE UNDERBOSS: THE RISE AND FALL OF A MAFIA FAMILY* (1989).

study is by Professor James B. Jacobs.<sup>22</sup> Jacobs concludes:

[S]ome law enforcement officials and academic observers predict . . . that America [is] on the threshold of defeating Cosa Nostra. While one cannot help being impressed by the government's overwhelming successes in organized-crime prosecutions across the United States since 1980, one must also be impressed by Cosa Nostra's power and expansive reach as evidenced in the testimony, wiretaps, and physical evidence that have been adduced . . . [in the current] trials. It is sobering to consider that, at least until recently, Cosa Nostra exerted powerful influence over the nation's largest union (the Teamsters), several other important national unions (Longshoreman's Association, Hotel Employees and Restaurant Employees International Union, and the Laborers International Union of North America), the New York City/New Jersey waterfront, the Fulton Fish Market, the New York City construction industry, garment industry, and trash-hauling industry, and numerous other businesses throughout the country. Over the last several decades, Cosa Nostra leaders have stood at the side of mayors, governors, and even presidents. The sum total of this much influence and power makes organized crime a significant part of the political economy of the United States. Unfortunately, no systematic way exists to determine how successful the government's organized-crime-control campaign has been, much less will be, in weakening or eliminating Cosa Nostra or in reducing the amount of racketeering and harm associated with Cosa Nostra. There are no systematic and reliable data on the health, wealth and power of Cosa Nostra as a whole or of its individual crime families. Hundreds of Cosa Nostra members have been sentenced to long prison terms, but we do not know whether replacements have or will move into their vacated roles. Many law enforcement professionals see the Cosa Nostra families as being in disarray and in permanent decline. But these observations are generally ad hoc and not part of systematic nationwide intelligence gathering and analysis effort. Electronic monitoring, computer systems, and the emergence of well-trained organized crime-control units and specialists make conceivable the implementation of an extensive intelligence operation. But resources and technology have to be supported by political will and organizational commitment. The danger is that attention will be drawn away from organized-crime control to other pressing law enforcement priorities and that, while the law enforcement machinery sleeps, Cosa Nostra will reconstitute itself. Finally, even if Cosa Nostra as an organization has been substantially weakened, we obviously cannot be sure that Cosa Nostra's racketeering activities have not been (or will not be) taken over by newly emerging crime groups, thereby negating any reduction in racketeering or societal harm.

Many of the economic and social forces that allowed organized crime to achieve such immense power are still operative. The citizenry's demand for illicit goods and services remains strong. Many unions remain vulnerable to

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22. JAMES B. JACOBS, *BUSTING THE MOB: THE UNITED STATES V. COSA NOSTRA* (1994).

labor racketeering, and those that have been “liberated” from organized crime have been very slow to repudiate their mob ties, if they have done so at all. Thus, it may be premature to predict that the investigations and trials of the 1980s constitute the beginning of the last chapter in the history of Cosa Nostra. Whatever the future may hold, the period from the late 1970s to the early 1990s has been marked by the most concerted and sophisticated attack on organized crime in the history of the United States.<sup>23</sup>

5. *Volume of RICO Litigation*: Criminal prosecutions under RICO are running at about the rate of 125 per year, 39 percent of which are in the organized crime area (including not only Mafia, but also drugs, etc.), while 48 percent are in the white-collar crime area (government corruption, business fraud, etc.), and 13 percent are in other areas (violent groups, including terrorists, white-hate groups, etc.).<sup>24</sup> Civil RICO filings are running at the rate of around 1,000 per year, although after the Supreme Court decided *H.J., Inc. v. Northwestern Bell Tel. Co.*,<sup>25</sup> the eagerly awaited “pattern of racketeering activity” decision, the number dropped 7.7 percent (from 1991 to 1992).<sup>26</sup> Estimates indicate that 58.6 percent of the civil RICO case filings would be in the federal courts in any event on an independent basis for federal jurisdiction.<sup>27</sup>

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23. *Id.* at 23-24.

24. Blakey & Perry, *supra* MAIN TEXT note 3, at 120.

25. 492 U.S. 229 (1989).

26. ADMINISTRATIVE OFFICES OF THE U.S. COURTS, 1992 ANNUAL REPORT OF THE DIRECTOR, table C-A2 (230,503 total filings, of which 0.389 percent were RICO (897)).

27. Blakey and Caesar, *supra* MAIN TEXT note 3, at 619.

## APPENDIX D (STATE OF MIND)

1. *Common Law Background*: Under the common law, “[c]rime” . . . [was] a compound concept, generally constituted only from concurrence of an evil-meaning mind . . . [and] an evil doing hand . . . .”<sup>1</sup>

2. *State of Mind and Conduct*: The two basic elements of criminality are called *mens rea* (state of mind) and *actus reus* (conduct).<sup>2</sup> The issue of state of mind in criminal law is carefully surveyed from ancient times to the present era in Max Radin, *Criminal Intent*.<sup>3</sup>

For historically the necessity for the existence of any mental element is the late requirement. The right of satisfaction recognized by early law is an undifferentiated claim which may in modern terminology be based on tort, crime or breach of contract . . . . Since the right . . . is a right to reparation, the question of the wrongdoer’s intent is considered irrelevant. [Nevertheless,] in . . . *Numbers*: 27-28 a . . . distinction was made between “ignorant” and “presumptuous” wrongs because in theocratic society sins and crime are similarly regarded . . . . In Plato’s *Laws* voluntary and involuntary injuries are systematically distinguished . . . . This conception was adopted . . . more fully in the mature Roman law . . . . The term *dolus malus* [wittingly and willfully] . . .

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1. *Morissette v. United States*, 342 U.S. 246, 250 (1952) (“normal individual . . . choose[s] . . . between good and evil”); *Bailey*, 444 U.S. at 402; LAFAVE & SCOTT, *supra* text note 148, at 193 (“[A] basic premise [of Anglo American substantive criminal law] is that conduct, to be criminal, must consist of something more than mere action (or non-action where there is a legal duty to act); some sort of bad state of mind is required as well.”); ROSCOE POUND, *CRIMINAL JUSTICE IN AMERICA*, 126-27 (1930) (“[T]he starting point of the criminal law . . . [in] the [19th] century . . . [was] that a criminal was a person possessed of free will who, having before him a choice between right and wrong . . . freely and deliberately chose [ . . . ] to do wrong . . . .”); BLACKSTONE, *supra* MAIN TEXT note 148, at 21 (“[A]s a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all. So that to constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will.”). Compare James William Cecil Turner, *The Mental Element in Crimes at Common Law*, 6 CAMBRIDGE L.J. 31, 37-48 (1936) (arguing that the development of common law crimes was from strict liability, through culpable negligence, to a minimum of recklessness), with OLIVER W. HOLMES, *THE COMMON LAW* 34-62 (Howe ed. 1963) (arguing that the development of common law crimes was from the desire for vengeance against intentional wrongs [subjectively assessed] to the desire to prevent dangerous conduct [objectively assessed], from moral retribution based on the assumption of a responsible person to utilitarian deterrence based on the assumption of behaviorism) and *United States v. Barker*, 514 F.2d 208, 227-37 (D.C. Cir.) (Bazelon, C.J. concurring) (after tracing the history of criminal responsibility, arguing for the adoption of a mistake of law standard, as a natural development of the concept of *mens rea*, based on the theory of punishing the vicious will. ), *cert. denied*, 421 U.S. 1013 (1975).

Pollock and Maitland conclude:

There seems to be now little room for doubt that . . . (we begin with a rigid principle which charges a man with all the evil that he has done and then mitigate). Law in its earliest days tries to make men answer for all the ills of an obvious kind that their deed bring up on their fellows.

2 POLLOCK & MAITLAND, *supra* MAIN TEXT note 148, at 470

2. See LAFAVE & SCOTT, *supra* text note 148, at 212 (“The basic premise that for criminal liability some *mens rea* is required is expressed by the Latin maxim *actus non facit reum, nisi mens sit rea* (an act does not make one guilty unless his mind is guilty).”).

3. VIII ENCYCLOPEDIA OF THE SOCIAL SCIENCES 126 (1944).

became . . . the embodiment of the concept of wrongful intent. While public punishment was permissible only if *dolus* was present, *culpa* or negligence, sufficed for the *delicta privata* [private wrong]. A criminal theory had to be recreated for Western Europe during the Middle Ages. The concept of law of the Germanic tribes consisted almost entirely of . . . elaborate tariffs of compensation for injuries. Practically no account was taken of intent or wrongful purpose . . . . But contact with the Roman Law and especially common law—the developed Christian theology went the full distance of considering only the wicked will as really punishable and the harm done as immaterial—forced men once more to pay attention to the subjective condition of the wrongdoer . . . . [But] . . . difficulties involved began to show themselves as soon as proof of a *mens rea* as an element . . . separate from the unlawful act was deemed necessary. Such distinct proof was usually unobtainable and recourse in general was had to . . . inferences from the fact that an unlawful act had been committed . . . . [*M*]ens rea is present at least theoretically when a criminal act is committed in the course of the performance of a “wrongful” action . . . . [T]he effect [in cases when a special state of mind is required] is merely to change the burden of proof; the crown must prove the ordinary *mens rea* by further evidence than the mere inference from the *actus reus* . . . . In no legal system has responsibility been confined to intentional conduct alone. The tendency in earlier centuries was to consider some forms of gross negligence as at least presumptively intentional . . . . Moreover, it is only in modern law that the decision that an act was merely negligent does not as a rule entail at least milder punishment.<sup>4</sup>

As Radin notes, the conception of responsibility embodied in the common law’s compound construct of evil-mind and evil-hand is rooted in religious traditions.<sup>5</sup> Nevertheless, under the Old Covenant, the Mosaic Decalogue reflected not individual, but group responsibility.<sup>6</sup> The ancient Semitic world was “collectivistic[;] the individual person did not have . . . importance”[; phrases like] the dignity of man [and] personal liberty . . . would have been idiot’s jargon to the men of Mesopotamia. . . .”<sup>7</sup> Individual responsibility, however, was prophesied in a New

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4. *Id.*; see also RAYMOND SALEILLES, *THE INDIVIDUALIZATION OF PUNISHMENT* 20-51 (1968) (tracing the history of the notion of punishment, which reflects the influence of Greek and Roman philosophy and Christianity on “the status of modern civilization with reference to a criminal law based on responsibility”); POLLOCK & MAITLAND, *supra* MAIN TEXT note 148, at 476-78 (tracing influence of Christianity, which “laid stress on the mental elements in sin,” on our English criminal law).

5. See *Genesis* 3:1-23 (The Jerusalem Bible) (the temptation of the serpent in the Garden of Eden to violate the command of God and the fall of man and woman).

6. See *Exodus* 20:1-6 (a violation of God’s commandment resulted in the “punish[ing] the father’s fault in the sons, the grandsons, and the great-grandsons.”).

7. JOHN L. MCKENZIE, *THE TWO-EDGED SWORD: AN INTERPRETATION OF THE OLD TESTAMENT* 78 (Image ed. 1966); see also *THE CODE OF HAMMURABI* §§ 229-30 (MacMillan 1920)(stating that

If a builder build a house for a man, and does not make its construction firm, and the house which he has built collapse and cause the death of the owner of the house, that builder shall be put to death. If it cause the death of a son of the owner of the house, they shall put to death a son of that builder.).

Covenant in Jeremiah<sup>8</sup> and Ezekiel.<sup>9</sup> Ultimately, for the Hebrews, the

dignity of the human person and the values of human life rest[ed] on a belief in the inner worth of the human person, a worth which consist[ed] in this, that there is a kinship . . . between man and God that is not shared by the lower animals. Otherwise, man is trapped in the organic cycle of birth, nutrition and decay and there is no hope more foolish than the hope that he can escape from this cycle.<sup>10</sup>

Christianity went beyond, but did not change the commandments of Mount Sinai, that is, the injunctions of the law, with the Sermon on the Mount, that is, the example of love.<sup>11</sup> In turn, Christianity then worked a revolution in thought and action on the Greco-Roman world.<sup>12</sup> While Roman law generally reflected concepts of personal responsibility, it did not fully distinguish between crime and tort.<sup>13</sup> In Roman law, the distinction was "between crime, which [fell] within the province of the public law, and delict, which [was] a matter of private law. . . . [T]he delictal sanction, which originated as a substitute for private vengeance, retained to the very end . . . a punitive character."<sup>14</sup> Delict had four essential elements: (1) *actus*, (2) *iniuria* (3) *damnum*, and (4) title to the property in the plaintiff. Originally, *iniuria* meant *non iure*, or without justification; it came to mean *dolus* or *culpa*, or fault.<sup>15</sup>

Nevertheless, Roman law did not always remain true to itself. Finally breaking with the last vestiges of the Old Republic, Theodosius I (346-359 B.C.) accepted the theory and practice of the "sacred monarchy." The person of the sovereign became sacred, law observance became a divine admonition, and criticism of imperial administration was forbidden. Extravagant consequences soon followed. For example, under Theodosius' son in the East, Arcadius, conspiracy to encom-

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8. *Jeremiah* 31:30 ("through his own fault only shall anyone die").

9. *Ezekiel* 18:4 ("[t]he man who has sinned, he is the one who shall die"). See J. HOLLAND SMITH, *UNDERSTANDING OF THE BIBLE* 232 (Image ed. 1968) (stating that

Ezekeil effected one of the most important revolutions in moral thinking . . . for to make every human being personally responsible for his or her own actions is to make every human being a complete person, an individual in his or her own right, no longer merely a son or daughter of so-and-so, the tribal father, but also a separate individual with a personal . . . destiny.).

10. MCKENZIE, *supra* APPENDIX D note 7, at 130-31.

11. Compare *Matthew* 5:1-48, with GEORGE STRECKER, *THE SERMON ON THE MOUNT* (1988).

12. For a summary of Greek thought, in all its fullness, and law, such as it was, on responsibility (voluntary/involuntary), degree of responsibility (state of mind), and the purposes of punishment (retribution, correction, and deterrence), see JOHN M. KELLY, *A SHORT HISTORY OF WESTERN LEGAL THEORY* at 12-35 (1992). For Roman thought, such as it was, largely derived from Greece, and law in all its fullness, little derived from Greece, on responsibility (voluntary/involuntary) degree of responsibility (state of mind), and the purposes of punishment (vindication, reformation, warning and isolation), see *id.* at 73-75.

13. See generally BARRY NICHOLAS, *AN INTRODUCTION TO ROMAN LAW* 207-26 (1962).

14. *Id.* at 208.

15. *Id.* at 222.



pass the death of high officials was treated as murder. The law struck, not only at conspirators, but also at dependents and friends. Sons of a convicted conspirator were allowed their lives by grace, but were denied the right of inheritance and were branded with the odium of their father's offense. Rightly, Gibbon termed this particular edict of Arcadius a "violat[ion of] every principle of humanity and justice."<sup>16</sup>

"In our jurisprudence [too,] guilt is personal . . . ."<sup>17</sup> The requirement of conduct in criminal law is a matter of constitutional due process.<sup>18</sup> The state of mind requirement in criminal law, however, is a question of legislative intent, not a matter of constitutional due process.<sup>19</sup> The First Amendment requires knowledge

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16. III EDWARD GIBBON, *THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE*, ch. XXXII, A.D. 397 (1883). For a powerful analysis of the impact of Christianity on various aspects of classic civilization, including philosophy and law, see CHARLES N. COCHRANE, *CHRISTIANITY AND CLASSICAL CULTURE* (1944). The impact of Christianity on the concept of responsibility is summarized by Clarence Crane Brinton:

Christianity so sets the way Westerners, even Westerners who would hate to think of themselves as Christians, think and feel about morals that it is worth . . . while . . . to put the broad lines of that way and its difficulties as succinctly as possible.

The individual, endowed with an immortal soul of priceless value, is a free moral agent. Once he is mature, he knows, by the grace of God and through the teachings of the church, right from wrong. If he chooses to do wrong, the conscience God has made part of, or a function of, his soul tells him he is guilty. He can perhaps plead physical duress, and, to a limited extent, ignorance, but he cannot plead total irresponsibility, cannot claim that he acted under cosmic necessity. He is, through his conscience, aware of the 'civil war within the breast,' aware within himself of something that drives him to sin, and of something within himself that urges him to virtue. Put in another way, he is aware of the contrast between his soul and his body, and aware that the soul ought to be the master of the body.

A HISTORY OF WESTERN MORALS 109 (Paperback 1990). See also *id.* at 171 ("In modern times, . . . the chief threat to . . . [the] Christian [view] has been a heresy as profound as any Christianity has faced. The doctrines . . . [of the] Enlightenment . . . the natural goodness . . . of man and . . . [its] corollary, the belief that evil is the product of environment . . . mostly of human or socio-economic environment. . . ."). That "heresy" also, of course, plagued Greek thought. See PLATO, *LAWS* bk X (arguing against a view of nature based on chance (*tuchē*) and for a view of nature based on design (*technē*) as necessary for absolute, not relative, moral standards, as materialism breeds relativism, which corrupts into skepticism and then degenerates into nihilism)). See generally Matthew A. Pauley, *The Jurisprudence of Crime and Punishment from Plato to Hegel*, 39 THE AMERICAN JOURNAL OF JURISPRUDENCE 97 (1994).

17. *Scales v. United States*, 367 U.S. 203, 224 (1961); cf. *Baender v. Barnett*, 255 U.S. 224, 225-26 (1921) (construing possession of counterfeit check to require "conscious" possession to avoid constitutional issue). But see *New York C. & H. R. R. Co. v. United States*, 212 U.S. 481, 493-95 (1909) (holding consistent with due process, a corporation criminally liable for acts of agent or employee done with intent to benefit corporation); *United States v. A & P Trucking Co.*, 358 U.S. 121, 125-26 (1958) (same rule followed in a partnership).

18. *Robinson v. California*, 370 U.S. 660, 667 (1962) (holding that status of being an addict cannot be made criminal consistent with principle of cruel and unusual punishment).

19. *Montana v. Egelhoff*, 116 S. Ct. 2013, 2016-21 (1996) (plurality opinion) (right to present evidence of intoxication to negate "purpose" or "knowing" causing death not matter of historical due process); *Staples v. United States*, 114 S. Ct. 1793, 1797 (1994); *Liparota v. United States*, 471 U.S. 419, 424 (1985) (citing *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812) (no federal common law crimes: "[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offense."); *United States v. Balint*, 258 U.S. 250, 253 (1922)). See generally, JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 27-28 (2d ed. 1960) ("In a very wide sense, the principle of legality—the

of the sexually explicit character of materials, although it does not require knowledge that the materials themselves are legally obscene.<sup>20</sup>

3. *Types of State of Mind*: Three distinct states of mind may be differentiated: "intent" (purpose), "knowledge" (conscious awareness), and "recklessness" (conscious risk taking). "Negligence" (should have known), too, must be considered.<sup>21</sup> Despite conceptual difficulties, negligence, too, may be a lesser form of purpose.<sup>22</sup> Other words are used to denote state of mind, but they do not necessarily carry separate meanings.<sup>23</sup> The words used to denote "state of mind" are also semantically ambiguous. "Intent" can mean "state of mind" or "purpose."<sup>24</sup> "Wilfully" is also semantically ambiguous.<sup>25</sup>

4. *Element by Element Analysis*: Each element of an offense must be considered separately on the issue of state of mind.<sup>26</sup> Typically, this gives rise to a syntactical ambiguity.<sup>27</sup> Congress drafts legislation against a common law background.<sup>28</sup> Seen against that background, strict liability becomes the exception, and silence is

'rule of law'—refers to and requires not only a body of legal precepts but also supporting institutions, procedures, and values . . . [T]he . . . principle of legality so far as the criminal law is concerned . . . is usually called *nulla poena sine lege* [no punishment without law].").

20. *United States v. X-Citement Video Inc.*, 115 S. Ct. 464, 469 n.2 (1994) (citing *Smith v. California*, 361 U.S. 147, 152 (1959)).

21. See *Bailey*, 444 U.S. at 403-06 (distinguishing between "general intent" and "specific intent"; "purpose", "knowledge", "recklessness" and "negligence"; requiring element by element analysis); *Liparota*, 471 U.S. at 423 n.5 (same); *United States v. Gypsum*, 438 U.S. 422, 437 (1978) (same); *United States v. Freed*, 401 U.S. 601, 612-14 (1971) (same) (Brennan, J. concurring); *Rex. v. Tolson* [1889] 23 Q.B. 168, 185 (Stephen, J.) ("It seems confusing to call so many dissimilar states of mind by one name"); Paul Robinson & Jane Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681 (1983).

22. *Stevenson v. United States*, 162 U.S. 313, 320 (1896) (holding manslaughter as lesser-included offense in murder) (cited with approval in *Schmuck*, 489 U.S. at 720 (requiring lesser included to be subject of greater offense)).

23. *LAFAVE & SCOTT*, *supra* MAIN TEXT note 148, at 212-14 ("wilfully," "maliciously," etc.); 1970 WORKING PAPERS, *supra* MAIN TEXT note 213, at 119 (identifying "a staggering array" of words used to denote state of mind in federal offenses).

24. ALI, COMMENTARIES, *supra* MAIN TEXT note 148, at 233.

25. Compare *Browder v. United States*, 312 U.S. 335, 341-42 (1941) (construing wilfully to denote "intentionally" as opposed to "accidentally"), with *United States v. Murdock*, 290 U.S. 389, 394-95 (1933) (done with a bad purpose, including conduct marked by careless disregard), ALI COMMENTARIES, *supra* MAIN TEXT note 148, at 249 ("Judge Hand: . . . [Wilfully is] an awful word! It is one of the most troublesome words in a statute that I know. If I were to have [an index of words] purged, 'wilful' would lead all the rest in spite of its being at the end of the alphabet.") (citing ALI PROCEEDINGS 160 (1955)), and 1970 WORKING PAPERS, *supra* MAIN TEXT note 213, at 148-51 (discussing "willfulness"). See also *United States v. Jewell*, 532 F.2d 697, 700-03 (9th Cir.) (deliberate ignorance or willful blindness), *cert. denied*, 426 U.S. 951 (1976); Rollin M. Perkins, "Knowledge" as a Mental State Requirement, 29 HASTINGS L.J. 953 (1978); see *infra* note 391 (discussing willful blindness). See generally REED DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING, 25-27, 32 (1965) (distinguishing between semantic (verbal), syntactical (modification), and contextual (text plus surrounding circumstances) ambiguity, that is, linguistic sources of multiple meanings).

26. *X-Citement Video Inc.*, 115 S. Ct. at 469; *Liparota*, 471 U.S. at 424 n.5; *Bailey*, 444 U.S. at 405-06.

27. *LAFAVE & SCOTT*, *supra* MAIN TEXT note 147, at 214 ("what, for instance, does 'knowingly' modify in . . . 'knowingly sells a security without a permit . . . ' As a matter of grammar . . . it is not at all clear how far down the sentence the word . . . travel[s]").

28. *X-Citement Video, Inc.*, 115 S. Ct. at 468; *Staples*, 114 S. Ct. at 1799; *Morissette*, 342 U.S. at 262.

not enough to infer that Congress intended strict liability.<sup>29</sup>

5. *Implication of State of Mind for Conduct, Surrounding Circumstances and Result*: The general rule is that knowledge is required on conduct,<sup>30</sup> as well as factual,<sup>31</sup> and, in appropriate circumstances, legal,<sup>32</sup> surrounding circumstances of a liability character.<sup>33</sup> Result, too, is knowledge.<sup>34</sup>

6. *Mistake of Fact and Law*: The requirement of a state of mind for factual elements in offenses gives rise to the general rule that a mistake of fact is a defense to a charge of criminality, which is reflected in the Latin maxim *ignorantia facti excusat* (ignorance of the fact excuses). On the other hand, a mistake in reference to the existence, meaning, or application of a legal principle is not typically a defense because no state of mind is generally required on legal elements.<sup>35</sup> The general rule is reflected in the Latin maxim *ignorantia juris quod quisque tenetur scire, neminem excusat* (ignorance of the law, which everyone is bound to know,

29. *Staples*, 114 S. Ct. at 1797; *Posters 'N' Things, Ltd. v. United States*, 114 S. Ct. 1747, 1752-53 (1994); *Bailey*, 444 U.S. at 406 n.6, *see also Gypsum*, 438 U.S. at 437 ("an interpretative presumption that *mens rea* is required").

30. *Posters 'N' Things, Ltd.*, 114 S. Ct. at 1753; *Bailey*, 444 U.S. at 408.

31. *Staples* 114 S. Ct. at 1802-04 (character of gun as automatic weapon).

32. *Ratzlaf*, 114 S. Ct. at 659-63 ("wilful" character of structuring of financial transaction act as unlawful); *Liparota*, 471 U.S. at 425 ("knowingly" character of use of food stamps as unlawful).

33. *See also United States v. Aguilar*, 115 S. Ct. 2357, 2362 (1995) (obstruction of justice; if intent is based upon conduct, knowledge is based upon surrounding circumstances). *But see Bailey*, 444 U.S. at 407, 409 n.7 (declining to decide whether "recklessness" or "negligence" suffices for liability surrounding circumstance in crime of escape); *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 562 (1971) (construing "knowingly violate regulation" not to require knowledge of regulation).

34. *Gypsum*, 438 U.S. at 444 n.21 (antitrust) ("conduct was undertaken with knowledge of its probable consequences"). *But see Pereira*, 347 U.S. at 9 (causing use of mail and interstate transportation; "where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used . . . It is common knowledge that . . . checks must be sent to the drawee bank for collection, and it follows that Pereira intended the El Paso bank to send . . . [the] check across state lines.") (citing *Kenofsky*, 243 U.S. at 443 ("bringing about") AND *Sheridan*, 329 U.S. at 391 ("one who induces another to do exactly what he intends . . . hardly can be held not to 'cause' what is so done.")); *see supra* MAIN TEXT note 251 *et seq.* (discussion of causing).

35. *See Ratzlaf*, 114 S. Ct. at 663 ("the venerable principle that ignorance of the law generally is no defense to a criminal charge"); *Cheek v. United States*, 498 U.S. 192, 199 (1991) ("the general rule that ignorance of the law for a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system"); *Williams v. North Carolina*, 325 U.S. 226, 238 (1945) (bigamy is mistake of law on validity of divorce; no due process violation; "mistaken notions about one's legal rights are not sufficient to bar prosecutors for crime"); *Sinclair v. United States*, 279 U.S. 263, 299 (1929) (contempt of congress; good faith reliance on advice of counsel question not pertinent no defense; question of law not pertinent ("His mistaken view of law is no defense")); *Horning v. Dist. of Columbia*, 254 U.S. 135, 137 (1920) (Holmes, J.) (conducting criminal loan-sharking business in District of Columbia from Virginia; "[i]t may be assumed that he intended not to break the law but only to get as near to the line as he could . . . , but if the conduct . . . crossed the line, the fact that he desired to keep within it will not help him."); *United States v. Reynolds*, 98 U.S. 145, 167 (1878) (bigamy: religious belief not a defense; "[i]gnorance of a fact may sometime be taken as evidence of a want of criminal intent, but not ignorance of the law . . . . [B]elief that the law ought not to have been enacted . . . is still belief and belief only.").

excuses no man).<sup>36</sup> Radin observes:

To realize the full reach of the doctrines of criminal responsibility it is also necessary to consider the effects of the doctrines of mistake or ignorance of fact or law . . . . The general tendency in all mature legal systems has been to excuse mistake of fact . . . . On the other hand, error of law have been very rarely excused. However, for . . . the Roman law . . . it has been disputed whether a consciousness of criminality was necessary. The Roman law seems to have allowed the plea of *ignorantia juris* to be made by rustics or women . . . . [M]ens rea in English law was never held to mean that ignorance of the criminal law was an excuse. In the German common law down to the end of the eighteenth century the rule was *error juris non excusat* . . . . In fact [,however,] many continental theorists are in favor of abrogating or at least modifying the generally prevailing old rule . . . [, since] modern criminal norms are so complex that the average citizen cannot be expected to know them all.<sup>37</sup>

7. *Strict Liability*: Regulatory<sup>38</sup> and child sex<sup>39</sup> offenses are exceptions to the requirement of state of mind where strict liability is the norm on aspects of the offense, as are elements that play a grading or a jurisdiction role only.<sup>40</sup> Nevertheless, some awareness that the item may be subject to regulation because of its dangerous, deleterious, or obnoxious character is required even in regulatory offenses.<sup>41</sup> The "regulatory" offense category, too, is not closed-ended.<sup>42</sup> Accordingly, in light of the general interpretative presumptive of *mens rea*, but the less than precise "regulatory" exception, federal criminal statutes that do not expressly set out a state of mind for each element are contextually ambiguous. When appropriate, liability may also be both strict and vicarious.<sup>43</sup>

36. See generally, BLACKSTONE, *supra* text note 148, at 27 ("But this must be an ignorance or mistake of fact, and not an error in point of law."); HALE, *supra* text note 148 at 41-42 ("Ignorance of the municipal law of the kingdom . . . doth not excuse any . . . because every person . . . is bound to know the law, and presumed so to do . . . . But in some cases *ignorantia facti* doth excuse . . ."). But see *Ratzlaf*, 114 S. Ct. at 663 ("Congress may decree otherwise").

37. *Supra* APPENDIX D note 3 at 129.

38. See *Staples*, 114 S. Ct. at 1797-98 (imposing strict criminal liability for regulatory offenses governed by statute by not requiring defendant to know the facts that make his conduct illegal).

39. See *X-Citement Video, Inc.*, 115 S. Ct. at 469 n.2 (recognizing *Morissette* principle that common law presumption of *mens rea* does not apply to sex offenses).

40. *Id.* at 469 n.3 (citing *Feola*, 420 U.S. 671 (1975) (assault on federal officer; conspiracy)); LAFAYE & SCOTT, *supra* text note 148, at 719 n.17 ("one who steals a valuable necklace, believing it to be costume jewelry, is guilty of grand larceny"). But see *United States v. Yermian*, 468 U.S. 63, 75 n.14 (1984) (false statement in federal jurisdiction; holding despite *Feola*, unnecessary to decide whether jurisdiction element was "negligence"); *Commonwealth v. Murphy*, 42 N.E. 504, 508 (Mass. 1895) ("The defendants in [this statutory rape prosecution] knew that they were violating the law. Their intended crime was fornication, at the least.").

41. See *Staples*, 114 S. Ct. at 1798.

42. See *Morissette*, 342 U.S. at 260 ("We attempt no closed definition [of regulatory offenses], for the law on the subject is neither settled nor static.").

43. See *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 70 (1910) (holding, consistent with due process, that accidental removal of trees may be criminal and subject to multiple damages); *United States v. Park*, 421 U.S. 658, 668-72 (1975) (holding corporate officer strictly liable for his subordinates' failure to prevent contamination of food shipped in interstate commerce).

### 8. *State of Mind and Penal Theory*: Radin observes:

The part played by intent [in the criminal law] . . . has depended largely upon the penal theory which has been current at any given time. Where the underlying principle has been retaliation . . . intent will play only a very slight part, since the purpose of retaliation . . . is to equalize the loss of the injured. Under the theory of deterrence, . . . punishment is directed against the will of the prospective offender, and hence it is conceived that it can be effective only if the offense is a matter which the will can control. When reformation is considered, . . . intent must still be considered . . . because it is only the wicked will that can be the subject of correction. . . . But even where contrition has made punishment unnecessary as a corrective, it may still be required from a religious . . . view . . . to purge away the pollution of the crime . . . . The writers of the Enlightenment emphasized classification of punishment according to the grievousness of the wrong . . . . In practice, . . . the continental penal system had degenerated into . . . arbitrary and often brutal . . . punishment. . . . The reformers demanded the fitting of the punishment to the crime and insisted upon the attribute of personal guilt, which meant necessarily the presence of intent . . . . The modern positivist school . . . refuses to admit the freedom of the will . . . . [T]he right to punish [is] . . . justified simply as a measure of social protection . . . . The initial tendency . . . was to accept overhastily theories of scientific determinism . . . . [A]s long as in popular belief intention and the freedom of the will are taken as axiomatic [,however,] no penal system that negates the mental element can find general acceptance. It is vital to retain public support of methods of dealing with crime.<sup>44</sup>

9. *Proof of State of Mind*: Once the legislature selects the elements of an offense, due process requires the government to prove each *and every* element to a jury beyond a reasonable doubt.<sup>45</sup> The burden of proof on elements of the offense may not be shifted to the defendant.<sup>46</sup> But the burden of proof may be shifted to the

44. *Supra* APPENDIX D note 3, at 129-30. For an excellent analysis of state of mind in federal criminal law, see generally Matthew T. Fricker & Kelly Gilchrist, Note, *United States v. Nofziger and the Revision of 18 U.S.C. § 207: the Need for a New Approach to the Mens Rea Requirement of Federal Criminal Law*, 65 NOTRE DAME L. REV. 803 (1990).

45. *United States v. Gaudin*, 115 S. Ct. 2310, 2320 (1995) ("The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged."); see also *Duncan v. Louisiana*, 391 U.S. 145, 149, 161-62 (1968) (entitling defendant accused of a crime punishable by two years in prison to a jury trial; "the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee"); *Blanton v. North Las Vegas*, 489 U.S. 538, 542 (1989) ("a defendant is entitled to a jury trial whenever the offense for which he is charged carries a maximum authorized prison term of greater than six months."); *In Re Winship*, 397 U.S. 358, 364-65 (1970) (requiring proof beyond a reasonable doubt of every fact regardless of whether accused is an adult or a child; "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"); Fed. R. Crim. P. 22(b) (12 member jury unless stipulated); *id.* Fed. R. Crim. P. 31(a) (requiring unanimity).

46. *Mullaney v. Wilbur*, 421 U.S. 684, 703-04 (1975) (holding it impermissible under Due Process Clause for state to shift burden of proof to defendant to establish heat of passion to reduce murder to manslaughter). *But see*

defendant on affirmative defenses.<sup>47</sup> Further, affirmative defenses may carry different burden of proof requirements.<sup>48</sup> "Presumptions," if they are understood as permissible inferences, are also not a violation of due process.<sup>49</sup>

10. *Other Common Law Defenses*: General common law defenses are often not expressly included in the elements of particular offenses. Sometimes they are statutory; sometimes they are implied in particular offenses.<sup>50</sup>

11. *Model Penal Code Approach*: The Model Penal Code provides for a minimum state of mind of "recklessness" for "material" surrounding circumstances.<sup>51</sup> "Material" includes liability and grading, but not venue or jurisdiction elements.<sup>52</sup> The commentary to the Code suggests that the common law rule was recklessness.<sup>53</sup> Williams does not support the citation; while Turner does, the issue cannot be so simply resolved.<sup>54</sup> As of 1986, thirty-six states followed the Model Penal Code, but to varying degrees.<sup>55</sup> The general rule for a mistake of fact on

*Gaudin*, 115 S. Ct. at 2321 (Rehnquist, C.J. concurring) ("Federal and State legislatures may reallocate burdens of proof by labeling elements as affirmative defenses . . . or they may convert elements into 'sentencing factors' for consideration by the sentencing court.") (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 85-86 (1986)).

47. *Patterson v. New York*, 432 U.S. 197, 206-09 (1977) (permitting state to require homicide-defendant to prove by preponderance of evidence the affirmative defense of extreme emotional disturbance to reduce murder to manslaughter); *accord*, *Martin v. Ohio*, 480 U.S. 228, 235-36 (1987) (allowing Ohio to place burden of proving self-defense on defendant charged with committing aggravated murder).

48. *Compare* *LeLand v. Oregon*, 343 U.S. 790, 798-99 (1952) (allowing Oregon to require a defendant to prove the affirmative defense of insanity beyond a reasonable doubt), *with* *Martin*, 480 U.S. at 230-31 (allowing Ohio to require a defendant to prove the affirmative defense of self-defense by a preponderance of the evidence).

49. *Barnes v. United States*, 412 U.S. 837, 841-47 (1973) (holding Due Process Clause not violated by presumption that defendant in possession of unexplained, recently stolen checks had knowledge that such checks were stolen).

50. *See, e.g.*, 18 U.S.C. § 17 (insanity); *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus. Inc.*, 113 S. Ct. 1920, 1926-29 (1993) ("Those who petition government for redress are generally immune from anti-trust liability") (citing *Eastern R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 136 (1961) (legislative petition)); *Bailey*, 444 U.S. at 409-14 (allowing duress as defense to escape from prison); *Kawakita v. United States*, 343 U.S. 717, 735 (1952) (allowing coercion or compulsion as defenses to treason); *United States v. Vigol*, 2 U.S. (2 Dall.) 346, 347 (1795); (allowing duress or terror as defenses to treason). *But see, supra* MAIN TEXT note 214 (collecting citations to decisions not recognizing victim exclusion rule for policy reasons); *United States v. Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 670-75 (1973) (misleading government); *United States v. Laub*, 385 U.S. 475, 487 (1967) (same); *Cox v. Louisiana*, 379 U.S. 559, 569-71 (1965) (same); *Raley v. Ohio*, 360 U.S. 423, 437-40 (1959) (same); *Brown v. United States*, 256 U.S. 335, 343 (1921) (self defense) (Holmes, J.) ("[I]f a man reasonably believes that he is in immediate danger of death or grievous bodily harm from his assailant he may stand his ground and that if he kills him he has not exceeded the bounds of lawful self-defense."); *In re Neagle*, 135 U.S. 1, 75-76 (1890) (defense of another; federal public duty defense to state murder charge); *Rowe v. United States*, 164 U.S. 546, 555 (1896) (self-defense; provocation and withdrawal); *LAFAVE & SCOTT, supra* MAIN TEXT note 148, at 7 ("The substantive criminal law is . . . concerned with much more than is found in the definitions of the specific crimes, for there are many general principles. . . [that] apply to more than a single crime . . .").

51. MODEL PENAL CODE § 202(e)(4) (1962).

52. *Id.* § 1.13(a)(10).

53. ALI COMMENTARIES, *supra* MAIN TEXT note 148, at 250 (citing GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 64-65 (2d ed. 1961) and *Turner, supra* APPENDIX D note 1).

54. *See generally* *Reg. v. Prince*, 32 Law Times Rev. 700 (1875) (discussing states of mind for the various elements of the unlawful taking of an unmarried girl under age of 16 out of possession of parents).

55. LAFAVE & SCOTT, *supra* MAIN TEXT note 148, at 4 n.15. *See, e.g.*, *People v. Goetz*, 497 N.E. 2d 41, 47 (N.Y. 1986) (applying "reasonably believes standard for self-defense under Penal Law § 35.15(1)).

liability elements in the states that have not codified their criminal statutes is "negligence."<sup>56</sup>

12. *Application to RICO*: The text of RICO neither provides a state of mind requirement nor distinguishes among its elements. Statutory silence, however, is not enough to make the offense a strict liability offense. RICO is hardly a regulatory offense. Accordingly, only RICO's commerce or legal elements ought to be held to be strict.<sup>57</sup> Its conduct, surrounding circumstances and result elements should be knowledge. The position of the Department of Justice is no longer defensible.<sup>58</sup>

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56. See, e.g., *Commonwealth v. Sherry*, 437 N.E. 2d 224, 233 (Mass. 1982) (mistake of fact on consent in rape; "[w]e are aware of no American court of last resort that recognizes mistake of fact, without consideration of its reasonableness as a defense; nor do the defendants cite such authority."). But see LAFAYE & SCOTT, *supra* MAIN TEXT note 148, at 407 (noting "uncritical acceptance of the general statement that the mistake must be reasonable").

57. See *United States v. Marren*, 890 F.2d 924, 932-33 (7th Cir. 1989) (RICO's conspiracy objective (tax evasion) does not include state of mind on existence of criminality); *United States v. Biasucci*, 786 F.2d 504, 512-13 (2d Cir.) (RICO aiding and abetting loan sharking does not include illegal rate of interest), *cert. denied*, 479 U.S. 827 (1986).

58. Compare W. KOLEN, *RICO AND STATE OF MIND*, I MATERIALS ON RICO 1286 (Cornell Institute on Organized Crime, G. Blakey ed. 1980)(state of mind implied), with U.S. DEPARTMENT OF JUSTICE, *RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO): A MANUAL FOR FEDERAL PROSECUTORS* 173-74 (1990)(no state of mind implied). But see *United States v. Baker*, 63 F.3d 1478, 1493 (9th Cir. 1995)("[a] defendant can be guilty of conspiring to violate RICO if he possesses the mental state necessary for conviction of the substantive RICO offense. The *mens rea* element necessary for a substantive RICO conviction is the same as is required for the predicate crime. . . *United States v. Scotto*. Because the [predicate offense] does not require proof of intent to violate the law, the defendants can be guilty of conspiring to violate RICO even if they were not aware their actions were illegal.")

## APPENDIX E (§ 1964(a))

18 U.S.C. § 1964(a) (1994) provides:

The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

1. *Scope of § 1964(a)*: 18 U.S.C. § 1964(a) grants federal district courts jurisdiction “to prevent and restrain” violations of 18 U.S.C. § 1962. Appropriate orders, “including, but not limited to,” those requiring divestment, restrictions on activities or investments, and dissolution or reorganization are expressly authorized. The Attorney General may seek relief under § 1962(a).<sup>1</sup> Section 1964(b) sets aside the common law rule that equity will not enjoin a crime.<sup>2</sup> Without § 1964(b), only the victim of the violation would be authorized to sue under § 1964(a).<sup>3</sup> Section 1964(b) puts beyond question the right of the government to seek relief without regard to traditional equity limitations.<sup>4</sup> RICO’s Liberal Construction Clause, RICO’s legislative history, and the Supreme Court mandate a broad reading of § 1964.<sup>5</sup>

2. *The Carson Decision*: In *United States v. Carson*,<sup>6</sup> the Second Circuit reversed a civil order of the district court requiring Donald J. Carson, a former Secretary Treasurer of Local 1588 of the International Longshoremen’s Association, to disgorge \$76,000 in ill-gotten gains. Carson accepted kickbacks from 1972 to 1988 from a waterfront employer in exchange for labor peace; the kickbacks were shared with various associates of the Genovese organized crime family. Carson also improperly accepted meals and entertainment from union employers and embezzled excess salary payments from the union. On appeal, Carson argued

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1. 18 U.S.C. § 1962(b) (1994).

2. *Gee v. Pritcard*, [Ch. 1818] 36 Eng. Rep. 670, 674.

3. *See In re Debs*, 158 U.S. 564, 582-84 (1895) (disallowing government to enjoin crime absent unusual circumstances).

4. *United States v. Cappelto*, 502 F.2d 1351, 1358-59 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975).

5. 84 Stat. 947 (1970) (liberal construction); *see supra* MAIN TEXT note 7 (discussing liberal and strict construction); S. REP. NO. 91-617 at 160 (1969) (§ 1964(A) “contains broad remedial provisions . . . [T]he only limit on remedies is that they accomplish the aim [of the statute]”); H.R. REP. NO. 91-1549 at 57 (1970) (same); *Sedima*, 473 U.S. at 492 n.10 (“§ 1964 [is] where RICO’s remedial purpose are most evident.”). The Supreme Court in *Sedima* noted that “RICO is to be read broadly. This is the lesson not only of Congress’s self-consciously expansive language and overall approach . . . but also its express admonition that RICO is to be liberally construed to effectuate its remedial purposes . . .” *Id.* at 497 (citations omitted).

6. 52 F.3d 1173, 1179 (2nd Cir. 1995).



that the remedies available under § 1964 did “not include the type of disgorgement order [handed down] . . . [so] that . . . the district court lacked the jurisdictional power to issue . . . such an order.”<sup>7</sup> The court acknowledged that an order of disgorgement was among the equitable powers available to a district court, but held that such orders only extended to remedying “ongoing or future” misconduct, not the “disgorgement of gains ill-gotten long ago.”<sup>8</sup> It noted:

Categorical disgorgement of all ill-gotten gains may not be justified simply on the ground that whatever hurts a civil RICO violator necessarily serves to ‘prevent and restrain’ future RICO violations. If this were adequate justification, the phrase “prevent and restrain” would read ‘prevent, restrain and discourage’ . . . .<sup>9</sup>

Such disgorgement is proper, the court held, only where a finding is made that “the gains are being used to fund or promote the illegal conduct, or constitute capital available for that purpose.”<sup>10</sup> Victims of violations had to press “their own claims.”<sup>11</sup>

3. *Initial Critique of Carson*: *Carson* was wrongly decided. The phrase “prevent and restrain” is a typical, common law couplet.<sup>12</sup> Contrary to the court’s “plain reading” of § 1962(a),<sup>13</sup> “prevent and restrain” is not solely future-looking. “Prevent” means “to stop, keep, or hinder (a person or other agent) from doing something.”<sup>14</sup> “Restrain” means “to check, hold back, or prevent (a person or thing) from some course of action.”<sup>15</sup> The terms are synonymous.<sup>16</sup> They are not, in short, part of a series that omits a third, but different concept, that is, “disgorge.” Section 1964 adopted the phrase from anti-trust provisions; they should be construed similarly.<sup>17</sup> The court mistakenly viewed the examples of orders set out in § 1964(a), that is, divestment, etc., as solely “forward looking and calculated to prevent RICO violations in the future.”<sup>18</sup> Accordingly, *all* orders under § 1964(a) had to be forward looking, etc. The Court ignored, however, that the list is “illustrative, not exhaustive.”<sup>19</sup> The examples in the list, too, are not solely

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7. 52 F.2d at 1180.

8. *Id.* at 1181.

9. *Id.* at 1182.

10. *Id.*

11. *Id.*

12. See *supra* MAIN TEXT note 151 (discussing the linguistic roots of legal usage).

13. 53 F.2d at 1181.

14. XII THE OXFORD ENGLISH DICTIONARY 445 (2d ed. 1989) (from the Latin).

15. XIII *Id.* at 756 (from the Old French).

16. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1798 (G & C Merriam Co., 1981).

17. *Holmes*, 503 U.S. at 266-68 (RICO to be construed like anti-trust); *DeBeers Consol. Mines Ltd. v. United States*, 325 U.S. 212, 218-19 (1945) (“[The Sherman Act’s jurisdiction] is to be exercised according to the general principles which govern the granting of equitable relief. . . . [I]t confers no new or different power than those traditionally exercised by courts of equity.”).

18. 52 F.3d at 1181.

19. S. REP. NO. 91-617 at 160 (1969) (“the list is not exhaustive”).

"forward looking." In *United States v. E.I. DuPont de Nemours & Co.*,<sup>20</sup> the Supreme Court ascribed to such orders three functions, only two of which are forward looking: (1) end the violation, (2) deprive the violator of the benefits of his violation, and (3) render impotent the power of the violator.<sup>21</sup> While RICO's equity jurisdiction ought to reflect at least the general scope of anti-trust jurisprudence, Congress also intended that RICO be more broadly, not more narrowly, construed.<sup>22</sup> The comments of sponsors are authoritative.<sup>23</sup> *Carson* cannot be justified; it ought not be followed elsewhere.

4. *Character of Recovery*: Generally, the measure of equitable disgorgement is loss to the victim or gain to the violator.<sup>24</sup> The measure of recovery in a private claim for relief for injury to business or property under § 1964(c) is treble damages and attorney fees.<sup>25</sup> The availability of rescission is not well-established.<sup>26</sup>

Government suits under § 1962(a) are not subject to a period of limitations or the doctrine of laches, according to RICO's legislative history.<sup>27</sup> "Property" does not include the economic aspects of homicide<sup>28</sup> or other personal injuries.<sup>29</sup> The

20. 366 U.S. 316, 365 (1961) (divestiture or dissolution).

21. *Accord*, *United States v. United Shoe Machine Corp.*, 391 U.S. 244, 252 (1968); *United States v. Grinnel Corp.* 384 U.S. 563, 577 (1966); *International Boxing Club of New York v. United States*, 358 U.S. 242, 252 (1959); *Shine Chain Theaters Inc. v. United States*, 334 U.S. 110, 128 (1948) ("[divestment is] like restitution[:] it merely deprives a defendant of the gains from his wrongful conduct."). *See also* *United States v. Crescent Amusement Co.*, 323 U.S. 173, 189 (1944) (divestiture; government not confined to enjoining future violation; "[t]hose who violate the Act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience."); JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE §§ 861-68, at 573-76 (1st Eng. ed. 1884) (injunctions reflect purposes of Roman Law *interdicts*: (1) restrain, (2) to prevent, (3) to restore, and (4) to secure rights); RICHARD POSNER, ECONOMIC ANALYSIS OF LAW, at 209-210 (4th ed. 1992) (a "restitutionary measure of damages . . . is used . . . to make the tort worthless to the tortfeasor").

22. *See, e.g.*, 115 CONG. REC. 9567 (1969) (statement of Sen. McClellan) ("Nor do I mean to limit the remedies available to those which have already been established"); *id.* at 6993-94 (statement of Sen. Hruska) ("The bill is innovative. . . . Hopefully, experts on organized crime will be able to conceive of additional applications of the law. The potential is great.").

23. *Turkette*, 452 U.S. at 532 (Senator McClellan termed "manager of bill"); *Lewis v. United States*, 445 U.S. 55, 63 (1980) (entitled to "weight"); *S & E Contractors v. United States*, 406 U.S. 1, 13 n.9 (1972) (same); *Galrono v. Press*, 347 U.S. 522, 527 (1952) (opinions of sponsors are "weighty gloss").

24. DAN B. DOBBS, LAW OF REMEDIES—DAMAGES—EQUITY—RESTITUTION §§ 1.1, 4.1, 5, 550-57 (2d ed. 1993) (restitution as disgorgement; analyzing core ideas of "restitution"); *Janigan v. Taylor*, 344 F.2d 781, 787 (1st Cir.), *cert. denied*, 302 U.S. 879 (1965).

25. 18 U.S.C. § 1964(c). *Compare* *Grogan v. Garner*, 806 F.2d 829, 838 (8th Cir. 1986) (securities claim; allowing highest recovery, including punitive damage), *with* *Beneficial Standard Life Ins. Co. v. Madariga*, 851 F.2d 271, 277 (5th Cir. 1988) (reserving question of RICO's preemption of state punitive damage claim).

26. *Compare* *Volckmann v. Edwards*, 642 F. Supp. 109, 115 (N.D. Cal. 1986) (allowing rescission if more than out of pocket damages), *and* *Demment v. Abbott Capitol Corp.*, 589 F. Supp. 1378, 1384 (N.D. Ill. 1984) (allowing rescission as possible legal relief), *with* *Miller v. Affiliated Financial Corp.*, 600 F. Supp. 987, 994 n.15 (N.D. Ill. 1984) (*Demment* rejected), *and* *Car Carriers, Inc. v. Ford Motor Co.*, 583 F. Supp. 221, 227 (N.D. Ill. 1984) (stating rescission not available), *aff'd on other grounds*, 789 F.2d 589 (7th Cir. 1986).

27. S. REP. NO. 91-617 at 160 (1969).

28. *Grogan v. Platt*, 835 F.2d 844, 845-48 (11th Cir. 1988).

29. *Drake v. B.F. Goodrich Co.*, 782 F.2d 638, 644 (6th Cir. 1989) (toxic waste); *Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163, 1169-70 (3d Cir. 1988) (mental distress).

property need not be business property.<sup>30</sup> Actionable damage does not occur until it is sustained.<sup>31</sup> The measure of the loss may be either benefit of the bargain<sup>32</sup> or out of pocket.<sup>33</sup> Recovery includes consequential damages, even in the absence of out of pocket damages.<sup>34</sup> It may include interference with a law suit<sup>35</sup> and legal expenses.<sup>36</sup> The victim is entitled to only a single satisfaction for each injury.<sup>37</sup> If a supplementary jurisdiction claim is present, the victim is entitled to the highest award. Punitive damages under the supplementary award may be recovered.<sup>38</sup> Treble damages are compensatory, not punitive; like liquidated damages or accumulative damages, they should be calculated as actual damages, then trebled; punitive damages, if any, should be awarded separately and in addition to treble damages.<sup>39</sup> The deduction for other recoveries is made after trebling.<sup>40</sup> Trebling is mandatory.<sup>41</sup> The jury is not told of trebling.<sup>42</sup> Damages are joint and several.<sup>43</sup> Neither indemnification nor contribution are available.<sup>44</sup> *In pari delicto* is not a

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30. *Bennett v. Berg*, 685 F.2d 1053, 1058-59 (8th Cir. 1982), *aff'd on rehearing*, 710 F.2d 1361 (8th Cir.), *cert. denied*, 464 U.S. 1008 (1983).

31. *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 708-09 (2d Cir. 1994) (holding suit on fraudulently induced loans premature until foreclosure frustrated); *Commercial Union Assurance Co. PLC v. Milken*, 17 F.3d 608, 612-13 (2d Cir. 1994) (precluding a finding of damage when capital plus interest is returned by liquidation trustee); *Stochastic Decisions, Inc. v. DiDomenico*, 995 F.2d 1158, 1164-65 (2d Cir. 1993) (holding action for interference with debt premature until debt, in fact, not collected); *Kaiser Cement Corp. v. Fischbach & Moore, Inc.*, 793 F.2d 1100, 1104 (9th Cir. 1986) (holding prior arbitration award to negate subsequent RICO suit).

32. *Liquid Air Corp. v. Rodgers*, 834 F.2d 1297, 1310 n.8 (7th Cir. 1987), *cert. denied*, 493 U.S. 917 (1989).

33. *Fleischhouser v. Feltner*, 897 F.2d 1290, 1300-01 (6th Cir. 1989).

34. *James v. Heinke*, 778 F.2d 200, 207 (5th Cir. 1985).

35. *Malley-Duff & Assocs. v. Crown Lite Ins. Co.*, 792 F.2d 341, 353-54 (3d Cir. 1986), *aff'd on other grounds*, 483 U.S. 143 (1987); *Miller v. Glen and Helen Aircraft, Inc.*, 777 F.2d 496, 498-99 (9th Cir. 1985).

36. *Stochastic Decisions Inc.*, 995 F.2d at 1167; *Bankers Trust Co. v. Rhoades*, 855 F.2d 1096, 1105 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); *Alexander Grant & Co. v. Tiffany Indus. Inc.*, 770 F.2d 717, 719 (8th Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986).

37. *Singer v. Olympia Brewing Co.*, 878 F.2d 596, 600 (2d Cir. 1989) (crediting prior settlements against subsequent recoveries), *cert. denied*, 493 U.S. 1024 (1990).

38. 84 Stat. 947 (1970) ("Nothing in [RICO] shall supersede any Federal, State or other law imposing . . . or affording civil remedies in addition to those . . . [in RICO]"). Compare *Grogan v. Garner*, 806 F.2d 829, 837 (8th Cir. 1986) (securities claim; one, highest recovery, including punitive damage), with *Beneficial Standard Life Ins. Co. v. Madariga*, 851 F.2d 271, 277 (5th Cir. 1988) (reserving question of RICO's preemption of state punitive damage claim).

39. See generally *United States v. Bornstein*, 423 U.S. 303, 313-16 (1976) (false claims Act; multiple damages; compensation); *Brody v. Daly*, 175 U.S. 148, 154-48 (1899) ("certain sum" damages not "penal"; "full compensation" and "remedial"); *Judith A. Morse supra* text, note 3. But see *Abell v. Potomac Ins. Co.*, 858 F.2d 1104, 1139-43 (5th Cir. 1988) (treble damages in excess of actual punitive for calculation; attorney fees on all theories), *vacated on other grounds*, 492 U.S. 914 (1989).

40. *Morley v. Cohen*, 888 F.2d 1006, 1013 (4th Cir. 1989); *Singer*, 878 F.2d at 600-01; *Liquid Air Corp.*, 834 F.2d at 1310.

41. *Abell*, 858 F.2d at 1141; *Cullen v. Marigotta*, 811 F.2d 698, 712 (2d Cir.), *cert. denied*, 483 U.S. 1021 (1987).

42. *Liquid Air Corp.*, 834 F.2d at 1308 n.7.

43. *Fleischhauer*, 879 F.2d at 1301.

44. *Miller v. Affiliated Financial Corp.*, 624 F. Supp. 1003, 1004 (N.D. Ill. 1985) (relying on *Texas Industries v. Radcliff Materials*, 451 U.S. 630, 639-45 (1981) (anti-trust)).

defense.<sup>45</sup> Prejudgment interest may be recovered.<sup>46</sup> A RICO claim for relief survives;<sup>47</sup> they may be assigned.<sup>48</sup> "Courts are divided on the . . . availability of punitive damage in civil RICO cases [under RICO itself] based on the divergence of views on the statutes punitive or remedial nature."<sup>49</sup>

5. *Limitations*: a. *Civil* "Few areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of period of limitations."<sup>50</sup> The jurisprudence of limitations under RICO is one of unmet need. Had Congress spoken in 1970, that would be the "end of the matter."<sup>51</sup> It did not. Disarray is the result. Government suits under § 1964(c) are not subject to a period of limitations or the doctrine of laches.<sup>52</sup>

Private suits are limited by an implied period of limitations. How that period came to be is a convoluted story. When one of RICO's principal predecessors was introduced, it contained provisions for private treble damage relief and a period of limitations.<sup>53</sup> When RICO was reported out of committee in the Senate, the provisions for a period of limitation were dropped, since the private treble damages relief provisions were omitted.<sup>54</sup> The private treble damage relief provisions were restored in the House. The House committee forgot, however, to include provisions for a period of limitations. An amendment was offered on the floor to correct the error, but it was withdrawn, not defeated, "as the bill was being processed under an informal agreement . . . to oppose all floor amendments . . . .

45. *Bieter v. Blumquist*, 848 F. Supp. 1446, 1449-50 (U. Minn. 1995).

46. *Abell*, 858 F.2d at 1142-43 (only to compensate).

47. *Faircloth v. Firesod*, 938 F.2d 513, 518 (4th Cir. 1991).

48. *National Mortgage Equity Corp. Mortgage Pool*, 636 F. Supp. at 1151.

49. GREGORY P. JOSEPH, CIVIL RICO 116 (1992). *But see* *American Express, Inc. v. McMahon*, 482 U.S. 220, 240-41 (1987) ("remedial role"; allowing RICO claims to be arbitrated; even though they reflect a police function, they are "primarily compensatory") (citing *Mitsubishi Motor Corp. v. Solar Chrysler-Plymouth Inc.*, 473 U.S. 614, 635 (1987)). For related anti-trust precedent, see generally *J. Truett Payne Co. v. Chrysler Motor Corp.*, 451 U.S. 557, 561-63 (1981) (§ 4 Clayton Act; actual injury); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969) (not susceptible to concrete proof); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 697-701 (1962) (inferred from circumstantial evidence); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946) (need not be measured with exactness); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931) (uncertainty of extent distinguished uncertain of fact); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927) (need not be calculated with absolute exactness); *Arnott v. American Oil Co.*, 609 F.2d 873, 888 (8th Cir. 1979) (anti-trust statutes do not authorize punitive damage awards, *cert. denied*, 446 U.S. 918 (1984)).

50. *Chardon v. Soto*, 462 U.S. 650, 667 (1983) (Rehnquist, J. dissenting); *see* *United States v. Marion*, 404 U.S. 307, 322 n.14 (1971) (reviewing policies behind civil limitation).

51. *Holmberg v. Armbrrecht* 327 U.S. 392, 395 (1946).

52. S. REP. NO. 91-617 at 160 (1969) (citing *United States v. Beebe*, 127 U.S. 338, 344 (1888); *United States v. Insley*, 130 U.S. 263, 266 (1888); *and* *United States v. Eastman Kodak Co.*, 230 F. 522 (W.D.N.Y. 1916) (anti-trust). *Compare* *United States v. Bonanno Organized Crime Family* 683 F. Supp 1411, 1457-58 (S.D.N.Y. 1988) (noting but not resolving issue), *aff'd and rev'd on other grounds*, 879 F.2d 20 (2d Cir. 1989), *with* *Oklahoma ex rel Dep't of Human Services v. Children's Shelter Inc.*, 604 F.Supp 867, 870-71 (W.D. Okla. 1985) (RICO suit with pendent claims; no limitations for pendent claims).

53. 115 CONG. REC. 6996 (1969).

54. S. REP. NO. 91-617 (reporting S. 30).

Withdrawal, rather than defeat, was desirable to avoid actions on unfavorable legislative history . . . ."<sup>55</sup> Faced with no period of limitations in the text and this legislative history, the Supreme Court in *Agency Holding Corp. v. Malley-Duff & Associates Inc.*,<sup>56</sup> incorporated into RICO the four-year period of limitations in the Clayton Act.<sup>57</sup> The Court did not decide "the appropriate point of accrual."<sup>58</sup> Nor did it consider the question of suspension.<sup>59</sup> Nor did it examine the calculation of damages, where discrete, multiple injuries are implicated. Accrual is a question of federal law.<sup>60</sup> Three elements are required: violator, violation, and injury.<sup>61</sup> Generally, accrual is a question of discovery, while commencement is a question of filing.<sup>62</sup> The federal courts of appeals are in disarray on the appropriate time of discovery as well as calculation.<sup>63</sup> That the period may be terminated for a

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55. Blakey & Gettings, *supra* MAIN TEXT note 3, at 1020 n.67. Compare *Religious Technology Center v. Wollersheim*, 796 F.2d 1076, 1084 (9th Cir. 1986) (relying on legislation history to find no private equity relief under RICO), *cert. denied*, 479 U.S. 1103 (1987), with *Bryant v. Yellen*, 447 U.S. 352, 376 (1980) ("Failure to enact suggested amendments . . . [is] not the most reliable indication[] of congressional intention.").

56. 483 U.S. 143, 152-56 (1987).

57. 38 Stat. 731 (1914), *as amended*, 69 Stat. 283 (1955).

58. *Agency Holding Corp.*, 483 U.S. at 157.

59. *See* Act of July 7, 1955, 69 Stat. 283 ("Whenever any civil or criminal proceeding is instituted by the United States . . . the running of the statute of limitations . . . in respect of every private right of action . . . shall be suspended during pendency of the claim . . . and for one year thereafter . . .").

60. *Cope v. Anderson*, 331 U.S. 461, 464 (1947).

61. *United States v. Kubrich*, 444 U.S. 111, 122 (1979) ("that he has been hurt and who has inflicted the injury").

62. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750-51 (1980) (federal, filing; diversity, follow state law).

63. *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1464-66 (7th Cir. 1992) (applying Discovery and Separate Accrual Rule; knew or should know of injury; requiring existence of other elements; limiting recovery to injuries sustained within period); *Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233, 241 (6th Cir. 1992) (knew or should know of conduct or pattern); *A Stucki Co. v. Buckeye Steel Castings*, 963 F.2d 360, 364-65 (Fed. Cir. 1992) (applying Discovery and Last Predicate Act Rules); *Glessner v. Kenny*, 952 F.2d 702, 707 (3d Cir. 1991) (construing "further injury" to mean "new and independent"); *Granite Falls Bank v. Henrickson*, 924 F.2d 150, 153-54 (8th Cir. 1991) (applying Pattern Rule; knows or should know of each independent injury and pattern that caused it); *Rodriguez v. Banco Central*, 917 F.2d 664, 665-68 (1st Cir. 1990) (applying Discovery and Separate Accrual Rule; know or should know of injury; limiting recovery to injuries sustained within period); *Bath v. Bushkin Gaims, Gaines & Jonas*, 913 F.2d 817, 820 (10th Cir. 1990) (applying Pattern Rule; knows or should know of each independent injury and pattern that caused it); *Bivens Gardens Office Bldg. Inc. v. Barnet Bank of Fla. Inc.*, 906 F.2d 1546, 1550-55 (11th Cir. 1990) (same); *Riddell v. Riddell Washington Corp.*, 866 F.2d 1480, 1489-90 (D.C. Cir. 1989) (assuming application of Discovery Rule); *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1130 (3d Cir. 1988) (applying Last Predicate Act Rule; knew or should know of elements of RICO, or, if further conduct occurs, from its termination, even if against another; allowing recovery for all injuries); *Hofstetler*, 905 F.2d at 904 (5th Cir.) (applying Discovery Rule; knew or should know of conduct); *Bankers Trust Co.*, 859 F.2d at 1096-1102 (2d Cir.) (applying Discovery and Separate Accrual Rule; know or should know of injury; other elements of RICO must exist; limiting recovery to injuries within period); *Beneficial Standard Life Ins. Co. v. Madariaga*, 851 F.2d 271, 275 (9th Cir. 1988) (Discovery and Separate Accrual Rule) (know or should know of injury; recovery of only injuries within period); *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 212, 220 (4th Cir. 1987) (applying Discovery Rule; knew or should know of injury); *LaPorte Const. Co. v. Bayshore Nat'l Bank*, 805 F.2d 1254, 1256 (5th Cir. 1986) (applying Discovery Rule) (citing, et al., *Bolling v. Founders Title*, 773 F.2d 1175 (11th Cir. 1984)). Fortunately, the Supreme Court granted certiorari in *Grimmet v. Brown*, 75 F.3d 506 (9th Cir. 1996), *cert. granted*, 1996 U.S. App. Lexis 3909 (Sup. Ct. June 17, 1996) to resolve the issue of accrual.

rackeering act considered in itself does not preclude its inclusion in a pattern.<sup>64</sup> Federal law also governs fraud in the concealment.<sup>65</sup> The injured party may be ignorant of his injury,<sup>66</sup> or of the identity of the violator,<sup>67</sup> or the facts making his injury actionable.<sup>68</sup> Otherwise, the tolling rules for such factors as absence from the foreign state, incarceration, competence, estoppel and waiver, death of a party, infancy, and duress are incorporated into federal law from state law.<sup>69</sup>

b. *Criminal*: The question of suspension implicates the criminal period of limitations. A statute is required to impose a limitation on government criminal prosecutions.<sup>70</sup> Congress enacted the first federal statute of limitations for offenses in 1789.<sup>71</sup> Sometimes, courts conceptualize the criminal statute of limitations as a jurisdictional bar;<sup>72</sup> other times, they conceptualize it as a defense that must be raised and may be waived.<sup>73</sup> Accrual is a question of commission, while commencement is a question of filing.<sup>74</sup> Usually, commission is a question of when the offense is completed.<sup>75</sup> A limited class of offenses continue until termin-

64. See, e.g., *Jensen v. Shelling*, 841 F.2d 600, 606-11 (5th Cir. 1988) (RICO and security fraud; RICO timely; securities barred); *Landy v. Mitchell Petroleum Technology Corp.*, 734 F. Supp. 608, 625 (S.D.N.Y. 1990) ("securities . . . focuses on plaintiff's knowledge of defendant's actions, while . . . RICO focuses on plaintiff's knowledge of when . . . harmed . . ."). See generally Mary S. Humes, Note, *RICO and a Uniform Rule of Accrual*, 99 YALE L.J. 1399 (1990); Paul B. O'Neil, Note, "Mother of Mercy, is This the Beginning of RICO?": The Proper Point of Accrual of a Prevailing Civil RICO Action, 65 N.Y.U. L. Rev. 172 (1990).

65. *Hornberg v. Armbrrecht*, 327 U.S. 392, 397 (1946) ("This equitable doctrine is read into every federal statute of limitations."); *Bontkowski v. First Nat'l Bank of Cicero*, 998 F.2d 459, 462 (7th Cir. 1993) (read into most); *Davis v. Grusemeyer*, 996 F.2d 617, 624 n.13 (3rd Cir. 1993) (duty to plead fraud in concealment with particularity); *Davenport v. A. C. Davenport & Son Co.*, 903 F.2d 1139, 1142 (7th Cir. 1990) (discovery: knew or should have known plus due diligence, if no active concealment; if active concealment, tolled until actual discovery).

66. *Baily v. Glover*, 88 U.S. (21 Wall) 342, 347 (1874).

67. *Holmberg*, 327 U.S. at 396-97.

68. *Traer v. Clews*, 115 U.S. 528, 537-38 (1885).

69. See, e.g., *Cullen v. Margiotta*, 811 F.2d 698, 719 (2d Cir. 1987) (RICO, duress; state law); Special Project, *Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 CORNELL L. REV. 1011 (1980). But see *DeCostello v. Int'l Broth. of Teamsters*, 462 U.S. 151, 161 (1983) (disregarding state law if inconsistent with federal policy); accord *Board of Regents v. Tomanio*, 446 U.S. 478, 485 (1980); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 369 (1977) ("absorption of state limitations would be inconsistent with congressional intent;" no time bar, but claim subject to laches); see also *Russell v. Todd*, 309 U.S. 280, 287 (1940) (equitable claim subject to laches; if legal and equitable claim, legal limitations controls).

70. *United States v. Thompson*, 98 U.S. (8 Ott) 486, 489 (1878); *United States v. Hoar*, 26 Fed. Cases 329, 330 (Cir. Ct. D. of Mass. 1821) (Story, J.) ("the great public policy of preserving . . . public rights").

71. *Laws of the United States*, 113 § 32 (1789).

72. *Benes v. United States*, 276 F.2d 99, 109 (6th Cir. 1960).

73. *Biddinger v. Comm'r of Police*, 245 U.S. 128, 135 (1917) (defense that must be asserted); *United States v. Wild*, 551 F.2d 418, 421-2 (D.C. Cir. 1977) (defense may be waived), cert. denied, 431 U.S. 916 (1976).

74. 18 U.S.C. § 3282 (1994); *United States v. Madrid*, 842 F.2d 1090, 1096 (9th Cir. 1988) (RICO; tolled since subsequent indictment essentially identical), cert. denied, 488 U.S. 912 (1988); *United States v. Robilotto*, 828 F.2d 940, 949 (2d Cir. 1987) (superseding RICO indictment measured from first filing); *United States v. Muse*, 633 F.2d 1041, 1043 (2d Cir. 1980) (en banc) (unless prejudice, if filed and sealed under Fed. R. Crim. P. 6(c)(4) filed, not timely), cert. denied, 450 U.S. 984 (1981).

75. *United States v. Irvine* 98 U.S. 450, 451 (1878) ("withholding pension" committed when "withheld"; "Whenever the act or a series of acts necessary to constitute . . . [the offense] . . . have transpired, the crime is complete, and from that day the Statute of Limitations begins to run . . ."); accord *Pendergast v. United States*, 317 U.S. 412, 418 (1943).

ated.<sup>76</sup> Once a judgment is made to treat an offense as continuing, dividing it into segments to make it separate offenses is improper.<sup>77</sup> Conspiracies are presumed to continue until abandonment, success, or frustration.<sup>78</sup> Under certain circumstances, the running of the criminal statute of limitations may be tolled.<sup>79</sup> Currently, the general period of limitation for federal offenses is five years.<sup>80</sup> It is liberally construed in favor of repose.<sup>81</sup> RICO does not contain a special criminal period of limitation; it is governed by the general period.<sup>82</sup> Even though "racketeering activity" under § 1961(1)(A) says "chargeable" under state law, the state period of limitation does not apply.<sup>83</sup> Section 1962(d) is a continuing offense.<sup>84</sup> General continuing offense jurisprudence applies.<sup>85</sup> Under § 1962(c), the period of limitation runs from the last predicate act in the pattern.<sup>86</sup> Alternatively, it runs

76. See, e.g., *United States v. Kissel*, 218 U.S. 601 (1910)(anti-trust conspiracy). Justice Holmes wrote:

[T]he mere continuation of the result of a crime does not continue the crime. But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, and there is such continuous cooperation," it is a continuing offense.

*Id.* at 607 (citation omitted).

77. See, e.g., *In re Snow*, 120 U.S. 274, 282-86 (1887) (cohabitation).

78. *Forman v. United States*, 361 U.S. 416, 422-23 (1960) (actual agreement to conceal may be shown); *Grunewald v. United States*, 353 U.S. 391, 396-97 (1957) (if overt act required, last overt act marks termination; mere acts of concealment do not continue conspiracy); *Fiswick v. United States*, 329 U.S. 211, 217 (1946) (arrest works frustration); *Hyde v. United States*, 225 U.S. 347, 369-70 (1912) (defendant must show affirmative conduct to abandon conspiracy); *Brown v. Elliott*, 225 U.S. 392, 400-01 (1912) (scheme to defraud; last overt act in scheme marks termination; "every overt act was the act of all of the conspirators"); *Brown v. Elliott*, 225 U.S. 32, 401 (1911) (presumed); *Kissel*, 218 U.S. at 610 (abandonment or success); *Bannon v. United States*, 156 U.S. 464 (1895). The Court in *Bannon* noted:

It has always been . . . , and is still, the law that, after *prima facie* evidence of an unlawful combination has been introduced, the act of any one of the conspirators in furtherance of such combination may be properly given in evidence against all. To require an overt act to be proven against every member of the conspiracy, or a distinct act connecting him with the combination to be alleged, would not only be an innovation upon established principles, but would render most prosecutions for the offense nugatory.

*Id.* at 469.

79. See, e.g., 18 U.S.C. § 3290 (1994) (flight); *United States v. Baily*, 444 U.S. 394, 414 n.10 (1980) (escape); *Streep v. United States*, 160 U.S. 128, 133 (1895) (flight); *Roberts v. Reily*, 116 U.S. 80, 97 (1885) (formal charge not required to show flight).

80. 18 U.S.C. § 3282 (1994).

81. *United States v. Habig*, 390 U.S. 222, 227 (1968).

82. See, e.g., *United States v. Errico*, 635 F.2d 152, 155 (2d Cir. 1980), *cert. denied*, 493 U.S. 911 (1982); *United States v. Coia*, 719 F.2d 1128, 1124 (11th Cir. 1983); *United States v. Bethea*, 672 F.2d 407, 419 (5th Cir. 1982); *United States v. Forsythe*, 560 F.2d 1127, 1134 (3d Cir. 1977).

83. *Brown*, 555 F.2d at 418 n.22 (incorporating definition from state law, not state procedural rules); *accord*, *Davis*, 576 F.2d at 1066-67.

84. *United States v. Field*, 432 F. Supp. 55, 59 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1371 (2d Cir.), *cert. dismissed*, 439 U.S. 801 (1978).

85. *United States v. Forsythe*, 560 F.2d 1127, 1134-35 (3d Cir. 1977).

86. *Bethea*, 672 F.2d at 419-20 (no act in pattern with five years; statute ran); *Field*, 432 F. Supp. at 55 (last act in pattern).

from each collection of an unlawful debt.<sup>87</sup> If any act in the pattern is within the five year period, the entire pattern of racketeering is subject to prosecution.<sup>88</sup> While "pattern" is usually the key element, other elements of conduct may occur after the end of the pattern of racketeering, that is, investment or use (§ 1962(a)) or acquisition or maintenance (§ 1962(b)); the period of limitation does not begin to run until they occur.<sup>89</sup> The First and Second Circuits apply a personal act rule.<sup>90</sup> Under the personal act rule, the period of limitations under § 1962(c) runs from the defendant's last personal act.<sup>91</sup> Section 1962(d) does not require an overt act.<sup>92</sup> The period of limitations is from the accomplishment of the conspiracy's objective or its frustration or abandonment.<sup>93</sup>

6. *Private Equity Relief*: The federal courts are in disarray on the availability to private litigants of various types of equity relief.<sup>94</sup>

7. *Final Critique of Carson*: The Senate committee that reported RICO ob-

87. *United States v. Pepe*, 747 F.2d 632, 663-64 n.55 (11th Cir. 1984) (collection outside of five year period beyond the statute).

88. *Field*, 432 F.2d at 59; *see also Forszt*, 655 F.2d at 103-04 (illegal payment after public official's term only act within five years subject to prosecution; "final installment is a continuous course of criminal conduct").

89. *United States v. Vogt*, 910 F.2d 1184, 1196 (4th Cir. 1990) (§ 1962(a); investment marks point at which time begins to run), *cert. denied*, 498 U.S. 1083 (1991).

90. *See supra* MAIN TEXT note 406, *et seq.*

91. *United States v. Persico* 832 F.2d 705, 714 (2d Cir. 1987); *United States v. Lopez*, 851 F.2d 520, 525 (1st Cir. 1988). *But see Bannon*, 156 U.S. 468-69 ("an innovation upon established principles"); *United States v. Evans & Associates. Constr. Co.*, 839 F.2d 656, 660-61 (10th Cir. 1988)(anti-trust; one act of one conspirator within period).

92. *See supra* note 420, *et seq.*

93. *United States v. Bortonousky*, 879 F.2d 30, 36 n.11 (2d Cir. 1989) (accomplishment); *Persico*, 832 F.2d at 713-14 (accomplishment or abandonment); *Lopez*, 851 F.2d at 525 (continues until withdrawal, etc.); *United States v. Coia*, 719 F.2d 1120, 1124 (11th Cir. 1983) (accomplishment or abandonment), *cert. denied*, 466 U.S. 973 (1984).

94. *First*: *Lincoln House, Inc. v. Dupre*, 903 F.2d 845, 848 (1st Cir. 1990) ("[I]t is not clear whether injunctive or other equitable relief is available at all in private civil RICO actions"); *Second*: *Trane Co. v. O'Connor Securities*, 718 F.2d 26, 28 (2d Cir. 1983) ("serious doubt" expressed on availability); *West Hartford v. Operation Rescue*, 726 F. Supp. 371, 376-78 (D. Conn. 1989) (no); *Aetna Cas. & Sur. Co. v. Liebowitz*, 570 F. Supp. 908, 910-11 (E.D.N.Y. 1983) (availability is an open question); *Third*: *Northeast Women's Center Inc. v. McMonagle*, 868 F.2d 1342, 1355 (3d Cir.) ("remains an open question"), *cert. denied*, 110 S. Ct. 261 (1989); *Fourth*: *Dan River v. Icahn*, 701 F.2d 278, 290 (4th Cir. 1983) (probably not); *Fifth*, *In re Fredeman Litigation*, 843 F.2d 821, 828-30 (5th Cir. 1988) (injunction to preserve damages improper; question of other forms of equitable relief reserved); *Sixth*: *NCR Corp. v. Feltz*, 1993 U.S. App. Lexis 1402 at \*6 (Jan 21, 1993) (6th Cir. 1993) (injunction to preserve damage proper); *Seventh*: *Duct-O-Wire v. U.S. Crane, Inc.*, 31 F.3d 506, 509 (7th Cir. 1994) (RICO and tortious interference; injunction to prevent activity pending litigation upheld under pendent claim; RICO issue not reached); *National Orgs. of Women Inc. v. Scheidler*, 765 F. Supp. 937 (N.D. Ill. 1995) (yes); *Eighth*: *Bennett v. Berg*, 685 F.2d 1053, 1064 (8th Cir. 1982) (dictum: yes), *aff'd on rehearing*, 710 F.2d 1361 (8th Cir.) (*en banc*), *cert. denied*, 464 U.S. 1008 (1983); *First National Bank & Trust Co. v. Hollingsworth*, 701 F. Supp. 701, 702-03 (W.D. Ark. 1988) (no); *Ninth*: *Religious Technology Ctr.*, 796 F.2d at 1081-82 (no); *Republic of Phillipines v. Marcos*, 862 F.2d 1355, 1366-68 (9th Cir. 1988) (RICO and fraud suit; injunction to preserve damage claim proper under pendent claim); *see generally*, Blakey & Ceasar, *supra* MAIN TEXT note 5, at 528 ("Wollersheim's reasoning [that equity relief is not available] is fatally flawed, since it is inconsistent with the text, legislative history, and purpose of RICO, and it cannot be easily squared with the teaching of the Supreme Court on how to reach statutes in general or RICO in particular.").



served:

Closely paralleling its takeover of legitimate businesses, organized crime has moved into legitimate unions. Control of labor supply through control of unions can prevent the unionization of some industries or can guarantee sweetheart contracts in others. It provides the opportunity for theft from union funds, extortion through the threat of economic pressure, and the profit to be gained from the manipulation of welfare and pension funds and insurance contracts. Trucking, construction, and waterfront entrepreneurs have been persuaded for labor peace to countenance gambling, loan-sharking and pilferage. As the takeover of organized crime cannot be tolerated in legitimate business, so, too, it cannot be tolerated here.<sup>95</sup>

RICO's "civil law approach" was designed to make "equitable relief [available] broad enough to do all that is necessary to free the channels of commerce for all illicit activity."<sup>96</sup> The "full panoply of civil remedies" was envisioned.<sup>97</sup> A "remedial" goal was sought.<sup>98</sup> The government is vigorously pursuing criminal and civil litigation against those—inside and outside—who corrupt unions.<sup>99</sup> Government criminal and civil suits promise much. Nevertheless, relegating victims to seeking their own recovery where figures in organized crime are implicated, as *Carson* does, is painting the wind. Only a handful of such civil suits are brought, not always with great success.<sup>100</sup> While private suits promise equitable relief (maybe) and treble damages plus counsel fees, practical considerations indicate that in litigation against violent individuals and the entrenched

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95. S. REP. NO. 91-617 at 78 (1969).

96. *Id.* at 79.

97. *Id.* at 81.

98. *Id.* at 82.

99. See generally, *The Judiciary and Related Agencies Appropriations for 1995: Hearings before the Subcomm. on State, Justice, Commerce on the House Comm. on Appropriations*, 103rd Cong., 2nd Sess. Part 2A 288-89 (1994) (describing FBI program for use of civil RICO to curtail organized crime in unions). It was noted:

The Government spent tens of millions of dollars over several decades prosecuting corruption in the IBT prior to bringing the civil RICO suit in 1989. [I]n large measure, the origins of the RICO statute can be traced to Kennedy-era Justice Department concern with corruption in the [Teamster's] union. [Nevertheless, the] Gambino Family, among others, has 'a long-term strategic plan with regard to control of labor unions.' "

*Id.* Part 2B 67-88 (quoting Salvatore Gravono, former underboss of the Gambino family); see also Michael J. Goldberg, *Cleaning Labor's House: Institutional Reform Litigation in the Labor Movement*, 1989 Duke L.J. 903 (1990); PRESIDENT'S COMMISSION ON ORGANIZED CRIME, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL, THE EDGE: ORGANIZED CRIME, BUSINESS, AND LABOR UNIONS (March 1986) (reporting role of organized crime in unions, principally the Teamsters, the International Longshoreman, the Laborers, and the Hotel and Restaurant Workers, successful criminal prosecutions, and calling for the use of civil RICO to attack the problem).

100. See, e.g., *White v. Fosco*, 599 F. Supp. 710, 715-16 (D.C. Cir. 1984) (dismissing RICO suit because racketeering injury not alleged; suit involved mob control union); *Blakey & Perry supra* MAIN TEXT note 3, 947-48 (describing major figures involved in unsuccessful litigation); *Hellenic Lines, Ltd. v. O'Hearn*, 523 F. Supp. 244 (S.D.N.Y. 1981) (dismissing RICO suit for failure to plead fraud with specificity; suit involved mob control union and kickbacks).

organizational power held by union leaders backed by virtually unlimited resources for attorney fees and litigation costs, government civil RICO litigation that secures disgorgement may be more effective for vindicating the rights of victims, taking the profit out of crime, and depriving violators of the incentive to engage in crime than expecting private parties, acting on their own, to pursue civil claims for relief, particularly where the statute of limitations may well run before a government criminal proceeding is even instituted. *Carson* is not only a bad decision on the law, it also makes for bad policy.

## APPENDIX F (MORALITY)

1. *Modern Approaches to Morality*: In modern times, a moral or ethical theory that goes beyond the simple acceptance of prevailing mores—which “are never very precise, always admit of exceptions, and may come in conflict”—will reflect one of several approaches: the deontological or the teleological.<sup>1</sup> It might also, of course, reflect skepticism or nihilism. “The term ‘deontology’ derives from the Greek words *deon* (duty) and *logos* (science).”<sup>2</sup> Broadly, in current usage, a deontological theory of ethics “holds that at least some acts are morally obligatory regardless of their consequences for human weal or woe.”<sup>3</sup> They implicate “rights” or “goods” that possess inherent value that may not be compromised.<sup>4</sup> The term “teleology” comes from the Greek words *teleo* (end) and *logos* (science).<sup>5</sup>

The common feature of . . . teleological theories of ethics is the subordination of the concept of . . . moral obligation to the concept of the good . . . [that is,] a particular course of conduct . . . is regarded as acceptable only if it can be shown that such conduct tends to produce a greater balance of good than do possible alternatives.<sup>6</sup>

These two approaches require, of course, the adoption of a particular conception of the “good” or “right”.<sup>7</sup> “Originally, the Greek term *skeptikos* meant ‘inquirers’.”<sup>8</sup> Basically, “[p]hilosophical skeptics . . . question[] whether any necessary or indubitable information can actually be gained about the real nature of things,” including morals.<sup>9</sup> Nihilism, on the other hand, possesses a double meaning:

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1. WILLIAM K. FRANKENA, *ETHICS* 13-14 (2d ed. 1973). For a history of Western ethics, see generally *ENCYCLOPEDIA OF ETHICS* 456-536 (1992). The classic, brief text is HENRY SIDGWICK, *OUTLINES OF THE HISTORY OF ETHICS* (1st ed. 1886). See also ALASDAIR C. MACINTYRE, *A SHORT HISTORY OF ETHICS* (1969); *AFTER VIRTUE: A STUDY IN MORAL THEORY* (1981); *THREE RIVAL VERSIONS OF MORAL ENQUIRY: ENCYCLOPEDIA, GENEALOGY AND TRADITION* (1990); *WHOSE JUSTICE? WHICH RATIONALITY?* (1988). Unfortunately, “[i]t is very difficult to find scholarly literature [in the law] regarding the theoretical basis of accomplice law.” Joshua Dressler, *Reassessing the Theoretical Under-Pinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 *HASTINGS L.J.* 91, 92 n.2 (1985); accord GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 637 n.4 (1978) (documenting “the extraordinary disinterest in complicity in the English-speaking world.”). The classic pieces, however, include Rollin M. Perkins, *Parties to Crime*, 890 *U. PA. L. REV.* 581 (1941) and Francis Sayre, *Criminal Responsibility For Acts of Another*, 43 *HARV. L. REV.* 689 (1930). More modern pieces include Sanford Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 *CAL. L. REV.* 323 (1985) (taking the approach of “doctrinal clarification”); Dressler, *supra*, (taking a utilitarian approach) and Paul Robinson, *Imputed Criminal Liability*, 193 *YALE L.J.* 609 (1984) (dealing with all forms of imputed liability).

2. 2 *THE ENCYCLOPEDIA OF PHILOSOPHY* 343 (1967).

3. *Id.*

4. See, e.g., IMMANUEL KANT, *CRITIQUE OF PRACTICAL REASON* 348 (Beck ed. 1949) (“To be truthful (honest) in declarations . . . is a sacred and absolute commanding decree of reason, limited by no expediency.”).

5. XVII *THE OXFORD ENGLISH DICTIONARY* 727-28 (1989).

6. 8 *THE ENCYCLOPEDIA OF PHILOSOPHY* 88 (1967).

7. FRANKENA, *supra* APPENDIX F note 1, at 15.

8. 7 *THE ENCYCLOPEDIA OF PHILOSOPHY* 449 (1967).

9. *Id.*

“moral norms or standards cannot be justified by rational argument” and because of a “loss of faith in God,” human existence is empty or trivial.<sup>10</sup> Accordingly, skepticism easily shades into nihilism. “If all moral codes are essentially matters of feeling and social pressure, then no one would be better or worse than another. The wise man, like the Sophists of Plato’s day, would simply adjust as best he could to the code of. . . society . . . .”<sup>11</sup>

2. *Law and Morality*: The issue of the relation between law and morality is complex; it, too, reflects its own history. Roscoe Pound observed:

The Greeks put a theoretical moral foundation under law by the doctrine of natural right. The Roman jurists made natural right into natural law and sought to discover the content of this natural law and to declare it. Thus they gave us an ethical philosophical natural law with an ideal form of Roman legal precepts, shaped with reference to an ideal of the existing social order, for its chief content. The Middle Ages put a theological foundation under natural law, giving us an authoritative theological natural law, which was used to sustain the Roman law, as interpreted by the glossators and commentators, in the process of receiving it as the law of Continental Europe. The seventeenth and eighteenth centuries took out this theological foundation and replaced it or partially replaced it by a rational foundation, giving us a rational-theological or rational-ethical natural law, which was used to make the strict law of the glossators and commentators and the feudal land law of medieval England into systems of law for the modern world. At the end of the eighteenth century Kant replaced the rational foundation by a metaphysical foundation, giving us a metaphysical natural law used to demonstrate the obligatory force of the legal order as it is. It remained only for the analytical jurists to argue that no foundation was needed; to urge that so far as concerns judge or jurist the law stands upon its own basis as a system of precepts imposed or enforced by the sovereign. If we felt inclined to go outside of the body of legal precepts so imposed or enforced, they referred us to the science of politics. Presently the analytical school in politics in America carried the movement for casting out ethics still further and limited the science of politics to a descriptive analytical method, leaving what ought to be to the philosophers as such. Thus the cycle is complete. We are back to the state as the unchallengeable authority behind legal precepts. The state takes the place of Jehovah handing the tables of the law to Moses, or Manu dictating the sacred law, or the Sun-god handing the code to Hammurabi. Law is law by convention and enactment—the proposition, plausibly maintained by sophists, which led Greek philosophers to seek some basis that made a stronger appeal to men to uphold the legal order and the security of social institutions.<sup>12</sup>

Pound then summarized the traditional view of the positivist, who recognizes a

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10. *Id.* at 515-16.

11. *Id.* at 515.

12. *LAW AND MORALS* 12-13 (1926) (footnotes omitted).

connection between law and moral at only four points: (1) creating new rules; (2) interpreting ill-expressed old rules; (3) the application of conflicting rules; and (4) the application of standards in the exercise of discretion.<sup>13</sup> He comments, "this plausible explanation represents juristic desire for certain, uniform, predictable justice much better than it represents judicial justice in action."<sup>14</sup> "In truth, there are continual points of contact with morals at every turn in the ordinary course of judicial administration."<sup>15</sup> Not every line drawn in morality, however, need be reflected in a legal rule.<sup>16</sup>

3. *Application of Modern Approaches*: A teleological perspective on the question of whether the state of mind required to be an accomplice or a co-conspirator should be "intent" or "knowledge" does not produce an answer that can be asserted with great confidence—absent "more factual knowledge."<sup>17</sup> The answer depends on probable consequences—short run or long run—of adopting one or the other of the two alternatives, the probabilities of which are more a matter of an intuition than empirical knowledge. On the one hand, the "intent" standard, casting a narrow net, would make personal transactions—commercial or otherwise—freer. No one would be expected to be a policeman of his customer's or acquaintance's morals: a daunting prospect in a society characterized by diversity of belief on most issues. Law enforcement resources would be concentrated on the most egregious cases. On the other hand, the "knowledge" standard, casting a wider net, would enlist each person in each transaction with another in a law enforcement role that would—arguably—better secure socially mandated policies. Each person would act as the eyes and ears of the police. Nevertheless, given limited public resources, that general enforcement of the wider net of "knowledge" would, in all likelihood, not occur. Accordingly, prosecutorial discretion, whose legitimacy in a society of divergent views is always suspect, would loom large; inevitably, it would be abused.

What, on balance, would happen? Reasonable people can obviously disagree on the ultimate outcome. Should the absence of an indisputable answer lead us to reject the teleological perspective and adopt skepticism or nihilism?

Here, as elsewhere, the skeptic [or nihilist] is a disappointed absolutist, and we must reject the sophistical dilemma, 'all or nothing'. In particular, we must

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13. *Id.* at 60-61.

14. *Id.* at 61.

15. *Id.* at 63.

16. See, e.g., *Regina v. Dudley and Stephens*, 14 Q.B. 273, 287 (1884) (Coleridge, C.J.) (deliberate killing of innocent person not justified by necessity; "law and morality are not the same, and many things may be immoral which are not necessarily illegal"); see also A.W. BRIAN SIMPSON, *CANNIBALISM AND THE COMMON LAW* (1984) (for a detailed historical exposition of *Dudley and Stephens*); cf. THOMAS AQUINAS, *SUMMA THEOLOGICA*, I, II, Q.96 art. 2 ("[H]uman law is framed for a number of human beings, the majority of whom are not perfect in virtue. Wherefore human laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain . . .").

17. FRANKENA, *supra* MAIN TEXT note 1, at 13.

beware the (often unconscious) legalism which supposes that if there is no *uniquely correct* solution to a moral problem, no solution to that problem is objectively right (or wrong). The language of 'right' and 'wrong' must not lure us into assuming that for every problem or situation there is one solution or choice which is *the* right one.<sup>18</sup>

"[P]recision is not to be sought for alike in all discussions . . . for it is the mark of an educated man," Aristotle taught, "to look for precision in each class of things just so far as the nature of the subject matter admit . . ."<sup>19</sup>

Similarly, analysis of the issue from a deontological perspective is no less uncertain. First, this perspective must, of course, articulate a concept of inherent "right" or "good" that would be at issue in the case under analysis. That "right" or "good" and its application then must be worked out. The result would be hardly less problematic than if we adopted a teleological perspective. Neither skepticism nor nihilism, of course, says much affirmatively for most persons on any particular issue. Like most post-modernist thought, these approaches are not helpful in resolving general questions of morality or public policy. Whatever else might be said of most post-modernist thought, "helpful" does not come to mind. Indeed, most post-modernist thought is typically described in terms characteristic of a skeptical or nihilistic stance.<sup>20</sup> In fact, most post-modern thought is neither "post" nor "modern." It is, if anything, "pre" and "ancient". The basic moves of skepticism and nihilism were worked out in Greek thought. Protagoras (c. 481-411 B.C.), the Sophist, argued that "man is the measure of all things, of those that are that they are, of those that are not that they are not."<sup>21</sup> Plato, in the *Theaetetus*, at least, read this famous dictum to espouse individualistic relativism.<sup>22</sup> If each actor is free to choose his or her own set of values, on what basis—or how—are we to decide what to do publicly? Gorgias (c. 483 to 375 B.C.), another Sophist, went further; he argued that (1) nothing exists; (2) if anything existed, it could not be known; and (3) if it could be known, it could not be communicated.<sup>23</sup> This approach, consistently followed, quickly produces a paralysis of private as well as public judgment. Neither a thorough-going skepticism nor a seriously entertained nihilism is able, therefore, to argue convincingly for particular positions in law or morality and neither develops an articulate and defensible public policy position

18. JOHN FINNIS, *FUNDAMENTALS OF ETHICS* 77 (1983) (emphasis in original).

19. ARISTOTLE, *ETHICS*, Bk. III, 1094a, 10-25.

20. See, e.g., ROBERT L. HAYMAN JR. & NANCY LEVI, *JURISPRUDENCE: CONTEMPORARY READINGS, PROBLEMS, AND NARRATIVES* 509 (1994) ("Post-modernism, then, can be—depending on your view—*pre*-modernism, *part* of modernism, or a genuinely *post*-modern phenomenon. And, of course, if it can be all of these things, then it very well might be nothing much at all.") (emphasis in original).

21. I. FREDERICK COPLESTON, *A HISTORY OF PHILOSOPHY* 87 (Image ed. 1993); see also EDWARD ZELLER, *OUTLINES OF GREEK PHILOSOPHY* 98-101 (Meridian ed. 1955) (same).

22. See COPLESTON, *supra* APPENDIX F note 21, at 88-91 (Plato's reading also in dispute); ZELLER, *supra* APPENDIX F note 21, at 99 (same).

23. COPLESTON, *supra* APPENDIX F note 21, at 93-95 (not all, however, take Gorgias literally); ZELLER, *supra* APPENDIX F note 21, at 104-05.

on something as concrete as the appropriate state of mind for accomplice or conspiracy liability.<sup>24</sup>

4. *The Traditional Approach*: Arguably, the "grand modern bifurcation of ethics [into its deontological or teleological perspectives] . . . however, fails to accommodate Platonic, Aristotelian, Thomistic and any other substantially reasonable ethics."<sup>25</sup> In fact, ethics "is thoroughly deontological." It is also "thoroughly teleological."<sup>26</sup> The basic concepts of ethics—right/wrong, vice/virtue, etc.—reflect goods that are valuable in themselves; they also reflect "identifying intelligible objects (ends) of human pursuit."<sup>27</sup> Historically, the traditional perspective in morality termed the accomplice or conspiracy issue one of "cooperation."<sup>28</sup> "Formal cooperation" involved consent and participation;<sup>29</sup> it corresponds roughly to the legal concepts of "intent" and "facilitation." Formal cooperation was condemned without qualification. "Material cooperation" did not involve consent; it corresponded roughly to acting with "knowledge," but not "intent."<sup>30</sup> Material cooperation could be immediate and proximate (helping a burglar pack his loot) or mediate and remote (selling the burglar his tools).<sup>31</sup> The morality of immediate and proximate cooperation was equated to formal cooperation; the morality of mediate and remote cooperation was judged by the principle of double effect. "Commonsense morality distinguishes what we do from what happens as a result of our actions, a bad act from an act with foreseen bad consequences."<sup>32</sup> Traditional moral philosophy reflected

this distinction in the principle of double effect, which allows good or indifferent actions to be performed in pursuit of a good end, even though evil consequences will follow, provided the evil consequences are not means to the

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24. See generally RICHARD H. POPKIN, *THE HISTORY OF SKEPTICISM FROM ERASMUS TO SPINOZA* (1979) (modern history of skepticism); EDWARD ZELLER, *THE STOICS, EPICUREANS AND SCEPTICS* 514-63 (1992) (history of skepticism in the ancient world).

25. FINIS, *supra* APPENDIX F note 18, at 84.

26. *Id.*

27. *Id.*

28. THE DICTIONARY OF CHRISTIAN ETHICS 129 (1986) ("Distinctions were made between formal and material, immediate and mediate, and proximate and remote cooperation.").

29. *Id.*

30. *Id.* St Augustine terms "the view that everything is uncertain. . . as . . . madness." CITY OF GOD 879 (penguin Classics 1972) "Reason. . . has . . . certain knowledge even if that knowledge is of small extent. . . , and anyone who supposes that [the senses] can never be trusted is woefully mistaken." *Id.* See also ST. AUGUSTINE, *THE RETRACTIONS*, 60; THE FATHERS CHURCH 6-11 (1968) (discussing his works on the new academy, a skeptical school of Greek philosophy). CHARLES NORRIS COCHRANE, *CHRISTIANITY AND CLASSICAL CULTURE* 431 (1944) sums up Augustine's position as "at once intellectual and moral. It depended. . . upon the [intellectual] assumption that there could be no significant doubt except upon the presumption of actual knowledge. . . and the [moral] fear that the acceptance of probabalism [of the New Academy] as a way of life would engender in many minds an utter despair of any truth to be discovered. . ."

31. *Id.*

32. PHILIP DEVINE, *ETHICS OF HOMICIDE* 106 (1978); see also Joseph M. Boyle Jr., *Toward Understanding the Principle of Double Effect*, 90 ETHIC 527 (1980).

good end, and. . . due proportion between the good sought and the evil accepted is observed . . . [;] the evil effect is said not to be intended by the agent, but rather only permitted by him.<sup>33</sup>

The issue is in dispute, but, arguably, the principle owes its origin to Thomas Aquinas in the 13th Century in his *SUMMA THEOLOGICA*.<sup>34</sup> After condemning suicide in Art. 5,<sup>35</sup> he justifies self-defense in Art. 7:

Nothing hinders one act from having two effects, only one of which is intended, while the other is beside the intention . . . ; yet, though proceeding from a good intention [to save one's own life], an act [of self-defense] may be rendered unlawful, if it be out of proportion to the end. . . . [So] if a man, in self-defence, uses more than necessary violence, it will be unlawful . . . ."<sup>36</sup>

Accordingly, if law ought to follow morality, in at least its broad contours, the line between the licit and the illicit for accomplice and conspiracy liability ought to be drawn, in light of its clearest instance, at "intent." While Judge Hand was

33. *Id.* (footnote omitted).

34. *SUMMA THEOLOGICA* II, II, Q.64 art. 7 (discussing murder); see Joseph T. Mongan, S.J. *An Historical Analysis of the Principle of Double Effect*, 10 *Theol. Stud.* 4-49 (1949):

In its application, the principle of the double effect may have been understood implicitly many centuries before it was actually formulated. Even as far back as the events of the Old Testament, we find examples of moral action justifiable under this principle. That the persons who performed these actions were implicitly using this principle we are not certain. . . . [B]efore the time of St. Thomas Aquinas there is no indication of a definitely formulated principle for the double effect. xxx But St. Thomas . . . gave no special treatment to the principle. xxx We must [also] admit that it is not entirely clear that St. Thomas himself enunciates this principle; according to some interpreters he does, according to others he does not. xxx [B]ut it is more reasonable to interpret . . . [St. Thomas's analysis of self defense] as an enunciation of the principle. . . .

For an overview of the principle, see William David Solomon, *Double Effect*, 1 *ENCYCLOPEDIA OF ETHICS* 268-69 (1992). In *Compassion in Dying v. State of Washington*, 79 F.3d 790, 823-24 (9th Cir. 1996) (en banc) (unqualified restrictions on assisted suicide violate due process), the Ninth Circuit, in the context of a "right to die" decision, flatly rejects, constitutionally and ethically, the principle of double effect, as it rests on the distinction between intent and knowledge; it also flatly rejects the distinction between commission and omission. In *Quill v. Vacco*, 80 F.3d 716, 725-31 (2nd Cir. 1996) (unqualified restrictions on assisted suicide violate equal protection), the Second Circuit, while eschewing a due process analysis, reaches a similar judgment on equal protection grounds. It is said the constitution does not embody the philosophy of Herbert Spencer or John Stewart Mill. *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 68-69 (1973) (Burger, C.J.) (Mill); *Lockner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J. in dissent) (Spencer). *Compassion In Dying* and *Quill* teach, instead, that it embodies a particular version of consequentialism. See, e.g., HENRY SIDWICK, *THE METHODS OF ETHICS*, 202 (7th ed. 1966) (difference between intended and (foresee verbal). Both circuits seem oblivious to the extent to which current criminal jurisprudence rests on these now "constitutionally suspect" distinctions. Seemingly, neither ethics nor law gives certain guidance. See generally, LaFave & Scott, *supra* MAIN TEXT note 148, at 202-212 (discussion of omission to act); G.E.M. Anscombe, *MODERN MORAL PHILOSOPHY*, 33 *Philosophy* 1-19 (1958) (influential defense of moral significance between the intended and the foreseen; Sidwick's position "obviously incorrect"); H.L.A. Hart, *Intention and Punishment* in *PUNISHMENT AND RESPONSIBILITY* 122-25 (1968) (influential critique of principle of double effect).

35. *Id.*; *SUMMA THEOLOGICA*, at Q.64 art. 5 (citing *Romans* 3:8 ("evil must not be done that good may come")).

36. *Id.* at Q. 64 art. 7.



himself a skeptic,<sup>37</sup> he surely got it right from the traditional perspective when he argued for "intent." His judgment is also particularly ironic, as he reached it by a process of balancing, although he believed that values were incommensurate.<sup>38</sup> Under the traditional approach, the issue of "knowledge" is more troublesome; the line between licit and illicit could arguably be drawn at that point for accomplice or conspiracy liability, but only if the matter of lack of due proportion between the "double effects" of particular conduct was factored into the analysis. Accordingly, Judge Posner's position in *Fountain*<sup>39</sup> is more nuanced, and it reaches an outcome more consistent with the traditional approach. Ironically, he, too, is both a skeptic and a pragmatist whose approach is basically teleological. Indeed, he puts little credence in the traditional approach.<sup>40</sup>

The most troublesome aspect of the traditional approach or in adopting Posner's position, however, lies in its uncertainty of application. Deciding the "knowledge" issue case by case may well be sufficient for a system of morality, which for theists at least binds in conscience before an omniscient but loving God. But "knowledge" will not work for the criminal law, since it needs a higher degree of certainty, if it is to be administered by "courts and juries."<sup>41</sup> Morality often gives no one right answer; the criminal law, at least, must try to do better.<sup>42</sup> If accomplice or conspiracy liability ought to rest on "knowledge" in certain cases, but not generally, the issue ought to be decided before the fact by the legislature for particular offenses. It ought not be evaluated on a case by case basis by prosecutors, judges or juries after the fact.<sup>43</sup> Such value judgments ought to be made by legislatures; prosecutors, judges, and juries ought not evaluate offenses in

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37. See, e.g., LEARNED HAND, *THE SPIRIT OF LIBERTY* 24 (Vintage ed. 1959) ("Experience soon teaches the seeker, not so much that he can find the key to the universe, as the limits of his search and the paucity of his trove [the result: tolerance, skepticism and humility]. . . .").

38. *Id.* at 198 ("Values are ultimate, they admit of no reduction below themselves; you may prefer Dante to Shakespeare, or Claret to Champagne; but that ends it.").

39. 768 F.2d 790, 797-98 (7th Cir. 1986), *cert. denied*, 475 U.S. 1124 (1986). See *supra* MAIN TEXT note 172 (discussion of a *Fountain*).

40. See RICHARD POSNER, *THE PROBLEMS OF JURISPRUDENCE* 454-69 (1990) (outlining a pragmatist manifesto); see also *id.* at 348 ("I am skeptical that moral philosophy has much to offer law in the way of answers to specific legal questions or even in the way of general bearings . . . . [Moral philosophy] reinforces the lesson of skepticism, a leitmotif of this book. But when it comes to specific cases, it lets us down.") (footnote omitted).

41. See ALI, COMMENTARIES, *supra* MAIN TEXT, note 148, at 318 n.58 (summarizing ALI debate in 1953).

42. Compare *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.) ("Although it is not likely that a criminal will carefully consider the text of the law before he murders . . . it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible, the line should be clear.), with *United States v. Ragen*, 314 U.S. 513, 523 (1942), "[t]he mere fact that a penal statute is so framed as to require a jury upon occasion [for example, "reasonable" force in homicide] to determine a question of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct").

43. See ALI, COMMENTARIES *supra* MAIN TEXT, note 148, at 319 ("The possibility that a broadened liability should obtain in particular contexts is one that can be, and has been dealt with in the drafting of the substantive offenses themselves . . . .").

each instance to determine if they are serious enough to be enforced through accomplice and conspiracy liability by “knowledge” or are so minor that the standard ought to be “intent.” Chief Justice Marshall put it well: “the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.”<sup>44</sup>

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44. *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820); *see also* *United States v. Reese*, 92 U.S. 214, 221 (1876) (Waite, C.J.) (“It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.”).

## APPENDIX G (ASSOCIATION IN FACT)

1. *The Concept of an Association-in-fact*: In *United States v. Turkette*,<sup>1</sup> the Supreme Court's seminal association-in-fact decision, the Court observed: "[under RICO, the] enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct . . . ."<sup>2</sup> The circuit courts of appeals are in conflict on the meaning of this sentence. Understanding that conflict requires looking at decisions before *Turkette*. Decisions prior to *Turkette* reflected little difficulty in finding that an association-in-fact existed.<sup>3</sup> The Eighth Circuit was an exception largely because in *United States v. Anderson*<sup>4</sup> it followed a false start by the Sixth Circuit, in which the Sixth Circuit reasoned in *United States v. Sutton*<sup>5</sup> that individual elements in RICO were mutually exclusive, not only in definition, but in proof. In *Sutton*, Judge Merritt argued that "enterprise" could not include "illicit associations," since then the concept of a "pattern of racketeering" would merge with the "enterprise."<sup>6</sup> Similar reasoning was followed by the First Circuit in its panel opinion in *Turkette*,<sup>7</sup> it was also advanced by commentators.<sup>8</sup> In *Turkette*, the Supreme Court flatly rejected this type of reasoning. "While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other."<sup>9</sup> As long as each element "remain[ed] a separate element which must be proved," RICO was satisfied.<sup>10</sup> The Court found its judgment supported by the unambiguous language of the statute and its legislative history.<sup>11</sup> Since *Turkette* rejected the reasoning of the *Sutton* panel, the other courts of appeals show little difficulty in implementing the approved perspective.<sup>12</sup>

1. 452 U.S. 576, 580 (1981) ("There is no restriction upon the associations embraced").

2. *Id.* at 583.

3. *See, e.g.*, *United States v. Con Errico*, 635 F.2d 152, 156 (2d Cir. 1980) ("community of interest and continuing core of personnel"), *cert. denied*, 453 U.S. 911 (1981); *Elliott*, 571 F.2d at 898 (diversified criminal enterprise).

4. 626 F.2d 1358 (8th Cir. 1980) (relying on *Sutton*), *cert. denied*, 450 U.S. 912 (1981).

5. 605 F.2d 260 (6th Cir. 1979), *vacated*, 642 F.2d 1001 (6th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981); *see also* *United States v. Turkette*, 632 F.2d 896 (1st Cir. 1980) (relying on *Sutton*, *rev'd* 452 U.S. 576 (1981)).

6. 605 F.2d at 266.

7. 632 F.2d at 899. *See also Anderson*, 626 F.2d at 1372 ("enterprise" does not encompass a simple association to commit the predicate crimes but is . . . "only an association having an ascertainable structure which exists for the purpose of maintaining operations directed toward an economic goal . . . that can be defined apart from . . . the predicate [offenses]").

8. *See* Tarlow, *supra* MAIN TEXT note 3, at 192 ("more soundly reasoned"); *Bradley*, *supra* MAIN TEXT note 3, at 855 ("beyond congressional intent").

9. 452 U.S. at 583.

10. *Id.*

11. 452 U.S. at 589-93 & n.10. For a detailed look at *Sutton*, *Anderson*, and *Turkette* that preceded the Supreme Court's opinion, but anticipated its result, *see* Blakey & Gettings, *supra* MAIN TEXT note 3, at 1025 n.91; *see also* *United States v. Jacobson*, 691 F.2d 110, 113 (2d Cir. 1982) ("interest" and "property right" not mutually exclusive in § 1963(a)(2)).

12. *See, e.g.*, *United States v. DeRosa*, 670 F.2d 889, 896 (9th Cir.) ("activities, standing apart from the predicate acts of narcotics distribution . . . are more than sufficient to establish . . . a criminal 'enterprise'"), *cert.*

The Eighth Circuit, however, remains troubled. In *Bledsoe*, the court stated that RICO was “not intended to be a catchall reaching all concerted action.”<sup>13</sup> A RICO violation requires “an association with an enterprise which is distinct from participation in the conduct of the enterprise through a pattern of racketeering activity.”<sup>14</sup> A RICO “enterprise cannot simply be the undertaking of the acts of racketeering, neither can it be the minimal association which surrounds these acts.”<sup>15</sup> A RICO enterprise is more than “a conspiracy of two or more persons . . . [plus] two or more overt acts of fraud,”<sup>16</sup> or “any confederation, no matter how loose or temporary.”<sup>17</sup> A RICO enterprise requires, in short, a distinct structure like, for example, “[t]he command system of a Mafia family. . . [or] the hierarchy, planning, and division of profits within a prostitution ring.”<sup>18</sup> Ironically, these principles put the Eighth Circuit on a collision course with the Sixth Circuit.<sup>19</sup>

2. *Composition of Association-in-fact*: An association-in-fact need not be composed solely of individuals.<sup>20</sup> An association-in-fact is not, however, a conspiracy; it may include the victim.<sup>21</sup> If an enterprise must possess more structure than a mere conspiracy, it is not much.<sup>22</sup>

*denied*, 459 U.S. 993 (1982); *United States v. Bagnariol*, 665 F.2d 877, 890-91 (9th Cir. 1981) (“separate and discrete element . . . [but] government is not precluded from using the same evidence,” which was sufficient to establish an association in fact to make gambling legal), *cert. denied*, 456 U.S. 962 (1982); *United States v. Griffin*, 660 F.2d 996, 999-1000 (4th Cir. 1981) (“proof of . . . existence [of enterprise] may overlap proof of the connecting pattern of racketeering activity” but from “circumstantial evidence,” “common purpose,” and “composition,” an inference of “continuity, unity, shared purpose and identifiable structure” may be made), *cert. denied*, 454 U.S. 1156 (1982).

13. 674 F.2d at 659.

14. *Id.* at 663.

15. *Id.* at 664.

16. *Id.* at 661.

17. *Id.* at 662.

18. *Id.* at 665. *See also Lemm*, 680 F.2d at 1198 (“(1) common or shared purpose; (2) some continuity of structure and personnel; and (3) an ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering”).

19. *Compare Anderson*, 626 F.2d at 1365 n.10 (association in fact issue could have been avoided if governmental entity charged), *with United States v. Thompson*, 685 F.2d 993, 1000 (6th Cir.) (governmental entity issue could have been avoided if association in fact charged), *cert. denied*, 459 U.S. 1072 (1982).

20. *See United States v. Console*, 13 F.3d 641, 652 (3d Cir. 1993) (association-in-fact of a law firm and medical practice), *cert. denied*, 114 S. Ct. 1660 (1994); *Blinder*, 10 F.3d at 1473 (group of corporations); *Fleischhauer v. Feltner*, 879 F.2d 1290, 1297 (6th Cir. 1989) (individuals and corporations—even 100% owned—may be association), *cert. denied*, 493 U.S. 1074 (1990); *United States v. Feldman*, 853 F.2d 648, 655-57 (9th Cir. 1988) (association may be of individuals and corporations; need not be conspiracy; defendant may be member), *cert. denied*, 489 U.S. 1030 (1989); *Perholtz*, 842 F.2d at 353, 356-59 (association may be of corporations, partnership and individuals; proof of enterprise by other acts and schemes proper); *Alcorn City*, 731 F.2d at 1168 (individuals and corporation associated to sell supplies); *United States v. Aimone*, 715 F.2d 822, 828 (3d Cir. 1983) (construction association), *cert. denied*, 468 U.S. 1217 (1984); *United States v. Thevis*, 665 F.2d 616, 625-26 (5th Cir.) (pornography association), *cert. denied*, 456 U.S. 1008 (1982); *Rhoades v. Powell*, 644 F. Supp. 645, 671-73 (E.D. Cal. 1986) (corporations and individuals), *aff’d*, 961 F.2d 217 (9th Cir. 1992).

21. *Aetna Casualty & Sur. Co. v. P & B Auto Body*, 43 F.3d 1546, 1557 (1st Cir. 1994) (not conspiracy); *Feldman*, 853 F.2d at 655-57 (not conspiracy); *United Energy Owners Comm., Inc. v. United States Energy Management Sys.*, 837 F.2d 356, 362-64 (9th Cir. 1988) (may include victim).

22. *United States v. Korando*, 29 F.3d 1114, 1117-19 (7th Cir.), *cert. denied*, 115 S. Ct. 496 (1994).

3. *Application of Person-Enterprise Rule to Associations-in-fact*: Under § 1962(c), the “person” and “enterprise” must be separate.<sup>23</sup> The enterprise-person rule may not be circumvented by pleading respondeat superior, aiding and abetting, or conspiracy.<sup>24</sup> On the other hand, the person-enterprise rule does not apply to § 1962(a).<sup>25</sup> Nor does it apply to § 1962(b).<sup>26</sup> The rule, too, does not apply to associations-in-fact.<sup>27</sup> The application of the rule to associations-in-fact “cannot survive scrutiny, . . . because it would preclude the quintessential organized crime prosecution in which a mobster is prosecuted for conducting the affairs of a Mafia family of which he is a member.”<sup>28</sup> Nevertheless, an association-in-fact may not be composed of simply an entity and related parties conducting its normal affairs.<sup>29</sup>

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23. *Pocket v. Tennessee Eastman Co.*, 889 F.2d 1481, 1489 (6th Cir. 1989); *Yellow Bus Lines*, 839 F.2d at 791; *Garbade v. Great Divide Mining & Milling Corp.*, 831 F.2d 212, 213 (10th Cir. 1987); *Schreiber*, 806 F.2d at 1397; *Bishop v. Corbitt Marine Ways, Inc.*, 802 F.2d 122, 123 (5th Cir. 1986); *Schofield v. First Community Corp.*, 793 F.2d 28, 29-33 (1st Cir. 1986); *Bennett v. United States Trust Co.*, 770 F.2d 308, 315 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986); *B.F. Hinsch v. Enright Refining Co., Inc.*, 751 F.2d 628, 633-34 (3d Cir. 1984); *Haroco*, 747 F.2d at 400; *Alexander Grant & Co. v. Tiffany Indus.*, 742 F.2d 408, 411 n.6 (8th Cir. 1984), *judgment vacated on other grounds*, 473 U.S. 922 (1985); *Computer Sciences Corp.*, 689 F.2d at 1190. *But see Hartley*, 678 F.2d at 988 (person and enterprise need not be separate). The minority rule (*Hartley*) is correctly decided. *See Blakey & Caesar*, *supra* text, note 3, at 581 n.235; Henry A. LaBrun, *supra* text note 3, at 179.

24. *Cox*, 17 F.3d at 1403-06.

25. *Busby v. Crown Supply*, 896 F.2d 833, 840-42 (4th Cir. 1990); *Official Publications, Inc. v. Cable News Co.*, 884 F.2d 664, 668 (2d Cir. 1989); *Yellow Bus Lines*, 839 F.2d at 790-791; *Garbade*, 831 F.2d at 213-214; *Petro-Tech*, 824 F.2d at 1360-61; *Schreiber*, 806 F.2d at 1398; *Schofield*, 793 F.2d at 31; *Masi v. Ford City Bank & Trust Co.*, 779 F.2d 397, 401 (7th Cir. 1985).

26. *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1190 (3d Cir. 1993) (issue of person-enterprise rule open); *Landry*, 901 F.2d at 425 (person-enterprise rule does not apply); *Official Publications*, 884 F.2d at 668 (maybe); *Jacobson*, 882 F.2d at 719 (assumed yes, without deciding); *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1307 (7th Cir. 1987) (no), *cert. denied*, 492 U.S. 917 (1989); *Wilcox v. First Interstate Bank, N.A.*, 815 F.2d 522, 529 (9th Cir. 1987) (no).

27. *Resolution Trust Corp. v. Stone*, 998 F.2d 1534, 1540-42 (10th Cir. 1993) (assumed without discussion); *Landry*, 901 F.2d at 425; *Atlas Pile Driving Co.*, 886 F.2d at 995; *Fleischhauer*, 879 F.2d at 1296-97; *Perholtz*, 842 F.2d at 353; *United Energy Owners*, 837 F.2d at 364; *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 28-29 (1st Cir. 1987); *Cullen v. Margiotta*, 811 F.2d 698, 729-730 (2d Cir.) (“we see no reason why a single entity could not be both the RICO ‘person’ and one of a number of members of the RICO ‘enterprise.’”), *cert. denied*, 483 U.S. 1021 (1987); *Haroco*, 747 F.2d at 401. *But see Computer Sciences Corp.*, 689 F.2d at 1190 (association-in-fact must be different from the RICO “person”). *Computer Science Corp.* is wrongly decided; it is also perverse. *See Blakey & Perry supra* MAIN TEXT note 3, at 968 n.386; *Blakey & Caesar, supra* MAIN TEXT note 3, at 481 n.235; Henry L. LaBrun, *supra* MAIN TEXT note 3, at 197-213. The person-enterprise rule is applied to associations-in-fact when only two entities are involved, one of which is the defendant. *Crowe v. Henry*, 43 F.3d 198, 206 (5th Cir. 1995).

28. MATHEWS, et al. *supra* MAIN TEXT note 306, § 6.0-3[B], at 6-43.

29. *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 343-45 (2d Cir. 1994) (corporation, subsidiaries and employees are not distinct); *Parker & Parsley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580, 584 (5th Cir. 1992) (corporation and employees are not distinct); *Board of County Comm’rs v. Liberty Group*, 965 F.2d 879, 885 (10th Cir.) (corporation and employees are not distinct), *cert. denied*, 113 S. Ct. 329 (1992); *Brittingham v. Mobil Corp.*, 943 F.2d 297, 302-03 (3d Cir. 1991) (corporation, subsidiary, and agents not distinct); *Yellow Bus*, 883 F.2d at 140 (corporation and employee are not distinct); *Odishelidze v. Aetna Life & Casualty Co.*, 853 F.2d 21, 23-24 (1st Cir. 1988) (corporation, subsidiaries, and employees are not distinct); *Computer Sciences Corp.*, 689 F.2d at 1190 (corporation and division not distinct). *But see Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 262-64 (2d Cir. 1996) (*Riverwoods* distinguished: two corporations in distinct lines of business operated by single person composed valid association in fact); *Richmond v. Nationwide Cassel*

4. *Proof of Association-in-Fact*: Generally, proving the existence of an association-in-fact enterprise presents a more difficult task than proving the existence of a legal entity enterprise.<sup>30</sup> Unlike a corporation or a partnership, no statute exists that sets forth the requirements for establishing an association-in-fact entity. In *Turkette*, however, the Supreme Court described the elements that the government or a civil plaintiff must prove to show the existence of an association-in-fact enterprise: "[t]he [enterprise] is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit."<sup>31</sup>

a. *Proof of Separateness*: Under *Turkette*, the "enterprise" must be separate from the "pattern of racketeering activity."<sup>32</sup> The circuit courts are split on "separateness." One group of courts does not engraft additional elements on the *Turkette* definition.<sup>33</sup> The Eleventh and Second Circuits take the broadest approach.<sup>34</sup> Similarly, the Second Circuit upholds a finding of an enterprise in "situations where the enterprise [is], in effect, no more than the sum of the predicate racketeering acts."<sup>35</sup> Another group of circuit courts of appeals, taking

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L.P., 52 F.3d 640, 646 (7th Cir. 1995) (managers and subsidiaries of corporation may be sufficiently distinct from corporation to preserve action under § 1962(c)).

30. See, e.g., *Griffin*, 660 F.2d at 999 ("proof simply of the 'legal' existence of the corporation, partnership, or other legal form of organization charged" is sufficient to prove existence of legal entity enterprise).

31. 452 U.S. at 583. *But see* *United States v. Weinstein*, 762 F.2d 1522, 1537 (11th Cir. 1985) (despite *Turkette*, the Eleventh Circuit follows the Fifth Circuit's definition of enterprise; the "definitive factor in determining the existence of a RICO enterprise . . . [is] an association of individuals, however loose or informal, which furnishes a vehicle for the commission of two or more predicate crimes") (citing *Elliott*, 571 F.2d at 898), *modified in part*, 778 F.2d 673 (1985), *cert. denied*, 475 U.S. 1110 (1986)). This standard does not go without criticism:

The [*Turkette*] Court's distinction between the enterprise and the pattern of racketeering elements of the offense is purely formalistic. Its definition of the enterprise element is clearly without substantial content. It would seem that 'an ongoing organization' is the same as 'a continuing unit.' Thus, it appears that evidence that a group of persons associated for a criminal purpose has some temporal continuity qualifies it as an enterprise. But since the commission of the two or more acts of racketeering constituting a pattern will invariably require some degree of continuity on the part of the criminal group, proof of pattern of racketeering is enough to establish proof of the enterprise under the Court's definition.

DAVID V. SMITH & TERRANCE G. REED, CIVIL RICO § 3.02, 3-25 - 3-26 (1993).

32. 452 U.S. at 583. The evidence used to prove "separate elements may in particular cases coalesce." *Id.*

33. *United States v. Doherty*, 867 F.2d 47, 67-68 (1st Cir.), *cert. denied*, 492 U.S. 918 (1989); *Fleischhauer*, 879 F.2d at 1297 n.4; *United States v. Alvarez*, 860 F.2d 801, 819 (7th Cir. 1988), *cert. denied*, 490 U.S. 1051 (1989); *Perholtz*, 842 F.2d at 363; *United Energy Owners*, 837 F.2d at 362; *United States v. Russo*, 796 F.2d 1443, 1462 (11th Cir. 1986).

34. See *Russo*, 796 F.2d at 1462 ("any group of persons 'whose association, however loose or informal, furnishes a vehicle for the commission of two or more predicate crimes'"); *United States v. Hewes*, 729 F.2d 1302, 1310-12 (11th Cir. 1984) (same), *cert. denied*, 469 U.S. 1110 (1985); *Cagnina*, 697 F.2d at 920-21 (same).

35. *United States v. Bagaric*, 706 F.2d 42, 55 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983) (citations omitted). The Court in *Mazzei*, 700 F.2d at 89, observed:

We do not, however, read *Turkette* to hold that proof of these separate elements [enterprise and pattern] be distinct and independent, as long as the proof offered is sufficient to satisfy both elements . . . . [If this were not the case,] a large scale underworld operation which engaged solely

its lead from the Eighth Circuit, require that the enterprise be an ongoing organization with a purpose greater than the commission of predicate acts and that it have an "ascertainable structure." This structure may be evidenced, for example, by a mechanism for decision-making and for controlling the affairs of the group.<sup>36</sup> State courts, too, face the issue under state law.<sup>37</sup> Following its ill-starred decision in *Anderson*, the Eighth Circuit initiated the split in the circuits when it added its gloss to *Turkette* in *Bledsoe*,<sup>38</sup> holding that an association-in-fact requires (1) common purpose; (2) ongoing organization with members functioning as continuing unit; and (3) an ascertainable structure distinct from that inherent in pattern of racketeering activity.<sup>39</sup> The easiest way to show separateness is to show that the enterprise is a legal entity or that it functions in some fashion besides racketeering.<sup>40</sup>

Even in those circuits following *Bledsoe*, the association-in-fact need not engage in lawful conduct beyond the pattern of racketeering or even engage in more than one kind of illegal conduct.<sup>41</sup> Thus, under the most restrictive test, the government in a criminal prosecution under § 1962 and § 1963, or the Attorney General or a private person in civil litigation under § 1962 and § 1964, must generally introduce evidence that reveals (1) structure or organization; (2) common purpose; and (3) continuity of the structure and its personnel.<sup>42</sup> The stated purpose for requiring proof of these three elements under the most restrictive rule

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in trafficking of heroin would not be subject to RICO's enhanced sanctions, whereas small-time criminals jointly engaged in infrequent sales of contraband drugs and illegal handguns arguably could be prosecuted under RICO.

See also *Errico*, 635 F.2d at 156 (although RICO does not embrace all racketeering activities outlawed by state law, it nonetheless has broad scope).

36. See *Calcasieu Marine Nat'l Bank v. Grant*, 943 F.2d 1453, 1461 (5th Cir. 1991) (requiring enterprise continuity); *Sanders*, 928 F.2d at 943-44 (requiring enterprise to be on-going with decision-making framework or mechanism); *United States v. Tillett*, 763 F.2d 628, 631 (4th Cir. 1985) (requiring enterprise to have "continuity of structure and personality"); *Riccobene*, 709 F.2d at 222-24 (requiring enterprise to possess structure for decision-making); *Bledsoe*, 674 F.2d at 665 (continuity of structure and personality); *Griffin*, 661 F.2d at 1000 (functions as a continuing unit).

37. See *supra* MAIN TEXT note 935 (discussion of *State v. Ball*, 141 N.J. 142, 661 A.2d 251 (N.J. 1995) (federal rule requiring "structure" rejected under N.J. RICO statute)).

38. 674 F.2d at 664-65.

39. See also *Stephens, Inc. v. Geldermann, Inc.*, 962 F.2d 808, 816 (8th Cir. 1992) ("[r]emove [the] predicate acts of racketeering, and the alleged association-in-fact evaporates"); *Diamonds Plus, Inc. v. Kolber*, 960 F.2d 765, 770 (8th Cir. 1992) (complicated organizational structure separate from racketeering); *Kragness*, 830 F.2d at 854-60 (*Bledsoe* explained); *Lemm*, 680 F.2d at 1201 ("if we eliminate . . . the predicate acts . . . evidence still shows an on-going structure"). The jurisprudence of the various circuits is comprehensively reviewed in *Chang v. Chen*, 80 F.3d 1293, 1297-98 (9th Cir. 1996) ("we now adopt the majority interpretation of the enterprise element, which requires the organization, formal or informal, to be 'an entity' separate and apart from the pattern of [racketeering] activity in which it engages." (quoting *Turkette*, at 583)).

40. See, e.g., *Blinder*, 10 F.3d at 1473-75 (other activities); *Bennett*, 685 F.2d at 1060 n.9 (legal entity).

41. Compare *United States v. Pelullo*, 964 F.2d 193, 210-12 (3d Cir. 1992) (organization may be inferred from pattern; need not engage in conduct beyond pattern) (citing *Perholtz*, 842 F.2d at 363), with *Console*, 13 F.3d at 649-52 (enterprise must have some function beyond what is necessary to commit predicate offenses).

42. See, e.g., *Perholtz*, 842 F.2d at 354.

is to “avoid the danger of guilt by association that arises because RICO does not require a proof of a single agreement as in a conspiracy case, and in order to ensure that criminal enterprises, which are RICO’s target, are distinguished from individuals who associate for the commission of sporadic crime.”<sup>43</sup> Elaborating these elements in *Riccobene*, the Third Circuit required the government (or a private plaintiff) to prove: (1) an ongoing organization having some guiding mechanism to direct the organization; (2) a continuous unit existing with associates fulfilling rose consistent with the organizational structure; and (3) a distinct organization, separate from the pattern of predicate activities, with an existence beyond that necessary to engage in racketeering.<sup>44</sup>

b. *Proof of Structure*: Structure in an enterprise is most easily seen in an organized crime family. La Cosa Nostra, “a secret national organization engaged in a wide range of racketeering activities, including murder, extortion, gambling and loan-sharking,”<sup>45</sup> serves as an appropriate example. The “Commission” holds the highest position in the organizational structure of La Cosa Nostra, and it serves as the “ultimate ruling body” of the families located beneath it.<sup>46</sup> La Cosa Nostra consisted of five families located within New York City, that is, the Genovese, Gambino, Colombo, Luccese, and Bonanno families,<sup>47</sup> as well as the numerous other families scattered throughout the country.<sup>48</sup> Each family contains a hierarchical organization: a “boss” heads the family and he is assisted by an “underboss.” Each family operates through “crews” consisting of a “capo” or “captain” (the leader of the crew), “soldiers” (who are “made” members of the family), and “associates”, that is, non-family members who are functionally related to the family.<sup>49</sup> Each individual serving in the various positions possesses his own specific responsibilities.

The requisite structure may, however, exist in other organized groups that are not organized crime family organizations. For example, in *Kragness*,<sup>50</sup> the government revealed the hierarchy of the organization as well as the role that each member of a drug organization possessed:

Kragness and Deters occupied positions of authority, arranging and directing the group’s drug importation and distribution. . . . Caspersen and Prescott

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43. *Atlas Pile Driving*, 886 F.2d at 996 (quoting *Kragness*, 830 F.2d at 855 (citations omitted)).

44. 709 F.2d at 221.

45. *Brooklier*, 685 F.2d at 1213.

46. *Salerno*, 868 F.2d at 528.

47. *Id.*

48. See, e.g., *United States v. Scarfo*, 850 F.2d 1015, 1017 (3d Cir.) (discussing activities of Philadelphia branch of La Cosa Nostra), *cert. denied*, 488 U.S. 910 (1988).

49. *United States v. Locascio*, 6 F.3d 924, 929 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1645 (1994); *United States v. Scopo*, 861 F.2d 339, 342 (2d Cir. 1988), *cert. denied*, 490 U.S. 1022 (1989); see also *Eufrazio*, 935 F.2d at 559-60 (discussing hierarchical structure of Scarfo family); HOWARD BLUM, *GANGLAND: HOW THE FBI BROKE THE MOB* (1993).

50. 830 F.2d at 857.



performed distribution functions throughout the course of their involvement in the business . . . . Lager was recruited by Kragness to act as a 'transporter,' and performed, this role throughout his involvement . . . . Holbrook also acted as a transporter. The Court also relied on this evidence to show that the organization constituted a continuing unit, one of the three prongs of the *Turkette*, *Riccobene* and *Bledsoe* standards. Similarly, in *Crockett*,<sup>51</sup> the government sought to convict the several players of an alleged criminal enterprise that engaged in extortion activities. The government's evidence revealed that Albert Tocco led what the government dubbed the "Tocco Organization."<sup>52</sup>

Clarence Crockett, William Dauber and Charles Bills worked underneath Tocco collecting " 'street tax' payments" from various businesses.<sup>53</sup>

c. *Methods of Proof of Structure*: Typically, the government utilizes various methods at trial to prove the structure of an enterprise. First, the government offers testimony from witnesses—either undercover agents, victims, or actual participants—from within the organizations. For example, in *Coonan*,<sup>54</sup> two members of the Westies organization, Francis "Mickey" Featherstone (second-in-command) and William "Billie" Beattie (a member), testified as to the organization's hierarchical structure. Their testimony revealed the roles of the organization's leader, Coonan, its second-in-command, Featherstone, and other members.<sup>55</sup> Similarly, in *Brooklier*,<sup>56</sup> the government utilized testimony from FBI agents who posed as extortion victims, while in *Locascio*,<sup>57</sup> Salvatore Gravano, an underboss to John Gotti, the head of the family, provided damaging testimony throughout the trial.<sup>58</sup>

Second, the government uses surveillance audio tapes of conversations between members of various organizations. For example, in *Scopo*,<sup>59</sup> and *Eufrasio*,<sup>60</sup> the

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51. 979 F.2d at 1208.

52. *Id.*

53. *Id.* at 1206-07; see also *United States v. Rosa*, 11 F.3d 315, 324-25 (2d Cir. 1993) (the group, a "retail narcotics organization . . . . consisted of a highly structured distribution network that purchased relatively pure narcotics, diluted them, packaged them in glassine envelopes at locations known as 'mills,' and sold them through 24-hour street sales locations known as 'spots.' "), *cert. denied*, 114 S. Ct. 1565 (1994); *United States v. Coonan*, 938 F.2d 1553, 1556, 1559-60 (2d Cir. 1991) (detailing criminal history of the Westies, a Manhattan-based organized crime group), *cert. denied*, 503 U.S. 941 (1992); *Aimone*, 715 F.2d at 825 (enterprise consisted of four individuals and a construction company, each maintaining a specific role within the enterprise's operations); *Clemente*, 640 F.2d at 1071-72 (Michael Clemente was the "ringleader" of enterprise that "infiltrated all aspects of waterfront business;" Fiumara was the New Jersey waterfront boss; Gardner and Colucci were presidents of two International Longshoremen's Association locals; Swanton was vice-president of a shipping company in New York); T. J. ENGLISH, *THE WESTIES: THE IRISH MOB* (St. Matius ed. 1990); DONALD GODDARD, *ALL FALL DOWN: ONE MAN AGAINST THE WATERFRONT MOB* (1980).

54. 938 F.2d at 1560.

55. *Id.*

56. 685 F.2d at 1213.

57. 6 F.3d at 930.

58. See also *United States v. Orena*, 32 F.3d 704, 710 (2d Cir. 1994) (government utilized testimony of an associate); *Scarfo*, 850 F.2d at 1017 (reliance upon codefendants' testimony).

59. 861 F.2d at 346-47.

60. 935 F.2d at 560.

government tape recorded conversations between two alleged members of an organized crime family. The government then used the tapes at trial to show that individuals were, in fact, members. Similarly, in *Locascio*,<sup>61</sup> the government lawfully obtained recordings of conversations between the defendants regarding various illegal acts.<sup>62</sup>

Third, the government uses expert witnesses to testify regarding the structure of an organized crime family to assist the jury in understanding this evidence.<sup>63</sup> Specifically, in *Locascio*, Special Agent Lewis Schiliro testified that "a 'boss' must approve all illegal activity and especially all murders, and that the functions of the 'consigliere' and 'underboss' are only 'advisory' to the 'boss.'"<sup>64</sup> In addition, he "interpreted the numerous surreptitiously taped conversations introduced into evidence, and identified the individuals speaking by their voices."<sup>65</sup>

The crucial evidentiary principle in this area is Federal Rule of Evidence 801(d)(2)(E). Under this rule, the trial court must find a conspiracy, membership of the declarant and the person against whom statement is to be introduced, and that the declaration was made during conspiracy and in furtherance of it.<sup>66</sup> Prior to *Bourjaily*, proof *aliunde* was required before the admission of co-conspirator's statements.<sup>67</sup> The circuit courts of appeals faithfully follow *Bourjaily*; some of their most important cases involve RICO and organized crime.<sup>68</sup>

61. 6 F.3d at 929-30.

62. See RALPH BLUMENTHAL, *Foreword to THE GOTTI TAPES* (Random House, Inc. 1992) (transcripts of tape recordings set out).

63. *Locascio*, 6 F.3d at 936.

64. *Id.* at 936.

65. *Id.* at 930; see G. ROBERT BLAKEY, *Foreword to ROBERT W. SHUY, LANGUAGE CRIMES: THE USE AND ABUSE OF LANGUAGE EVIDENCE IN THE COURTROOM* (1993) (reviewing legal history surrounding the use and interpretation of recorded conversations by experts).

66. FED. R. EVID. 801(d)(2)(E).

67. See *Bourjaily v. United States*, 483 U.S. 171, 177-83 (1987) (holding that court may rely on content of hearsay statement itself when deciding whether to admit that statement). *But see* *Glasser v. United States*, 315 U.S. 60, 74 (1942) (old standard, requiring independent evidence); *United States v. Nixon*, 418 U.S. 683, 701 (1974) (same).

68. *First Circuit: Anguilo*, 897 F.2d at 1201-03 ("furtherance" element not met by mere narrative); *United States v. Ochs*, 842 F.2d 515, 529 (1st Cir. 1988) (independent evidence sufficient when viewed in light of declaration). *Second Circuit: United States v. Maldonado-Rivera*, 922 F.2d 934, 958 (2d Cir. 1990), *cert. denied*, 501 U.S. 1211 (1991); *United States v. Long*, 917 F.2d 691, 701 (2d Cir. 1990) (mob prosecution under RICO; discussion of family disputes, operating structure and past practices of organization were in furtherance because they were not mere "idle chatter"); *Casamento*, 887 F.2d at 1171 (same); *Rastelli*, 870 F.2d at 836-37 (same); *Salerno*, 868 F.2d at 535-37 (same); *United States v. Persico*, 832 F.2d 705, 716 (2d Cir. 1987) (mob prosecution under RICO; briefing statements to fugitive held to be in furtherance), *cert. denied*, 486 U.S. 1022 (1988). *Third Circuit: Local 560*, 974 F.2d at 338 (mob-related civil suit; conspiracy presumed to continue); *United States v. Gambino*, 926 F.2d 1355, 1360-61 (3d Cir.) (mob prosecution under RICO; conditional admission proper), *cert. denied*, 501 U.S. 1206 (1991); *United States v. Traitz*, 871 F.2d 368, 399 (3d Cir.) (casual conversation, if serves to maintain trust and express approval of killings, is in furtherance), *cert. denied*, 493 U.S. 821 (1989). *Fifth Circuit: United States v. Ascarrunz*, 838 F.2d 759, 762 (5th Cir. 1988) (post-arrest statement by coconspirator who was not arrested may be used against arrested conspirator). *Sixth Circuit: United States v. Curro*, 847 F.2d 325, 326 (6th Cir.) (RICO prosecution; may use grand jury declaration itself although declarant presently deceased), *cert. denied*, 488 U.S. 843 (1988). *Seventh Circuit: United States v. Pallais*, 921 F.2d 684, 688 (7th Cir. 1990)

d. *Proof of Common Purpose*: In addition to showing the structure or organization of an enterprise, the prosecution must show that the individuals operating within the structure strived to achieve a common purpose. Generally, the underlying purpose concerns money-making. In *Rosa*,<sup>69</sup> for example, the organization ran a narcotics operation that, at its highest point, grossed more than \$8 million per month in heroin sales. Any member of the organization caught stealing the organization's money was severely disciplined. For example, Todd Middleton, a runner for the organization, testified that after being accused of stealing, his supervisor cut off one of his fingers.<sup>70</sup> Similarly, the purpose of the Commission of the La Cosa Nostra is "to regulate and facilitate the relationships between and among the several La Cosa Nostra families."<sup>71</sup> The duties of the Commission include:

to promote and coordinate joint ventures of a criminal nature involving the families, to resolve disputes among the families, to extend formal recognition to 'bosses' of the families and on occasion resolve leadership disputes within a family, to approve the initiation or 'making' of new members of the families, and to establish rules governing the families, officers and members of La Cosa Nostra.<sup>72</sup>

The Commission furthered its purpose by voting to have the boss of the Bonanno family killed so as to resolve a leadership dispute.<sup>73</sup> In *Aimone*,<sup>74</sup> through the enterprise's affairs, the defendants worked to "receiv[e] city construction contracts, tax abatements, and payments on fraudulent work orders." In *United States*

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("furtherance" standard criticized—statement ought to be "reliable;" idle chatter not admissible), *cert. denied*, 502 U.S. 842 (1991); *United States v. Herrero*, 893 F.2d 1512, 1527 (7th Cir.) (declaration made to recruit person by familiarizing person with conspiracy held in furtherance), *cert. denied*, 496 U.S. 927 (1990). *Eighth Circuit*: *United States v. Nevils*, 897 F.2d 300, 308 (8th Cir.) (casual statements held in furtherance if they advance conspiracy), *cert. denied*, 498 U.S. 844 (1990); *Leisure*, 844 F.2d at 1361-62 (mob prosecution under RICO; furtherance standard construed broadly: declarations solidified and facilitated conspiracy); *Kragness*, 830 F.2d at 866 (RICO prosecution; declaration relating to avoiding detection held in furtherance). *Ninth Circuit*: *United States v. Lujan*, 936 F.2d 406, 411 (9th Cir. 1991) (declaration to encourage additional participation held in furtherance). *Tenth Circuit*: *United States v. Perez*, 989 F.2d 1574, 1578 (10th Cir. 1993) (statement merely relating to past events held not in furtherance); *United States v. Johnson*, 911 F.2d 1394, 1403 n.2 (10th Cir. 1990) (RICO prosecution; statement was admissible because it was not mere narrative), *cert. denied*, 498 U.S. 1050 (1991). *Eleventh Circuit*: *United States v. Santiago*, 837 F.2d 1545, 1549 (11th Cir. 1988) (boasts that build confidence held in furtherance); *District of Columbia Circuit*: *Perholtz*, 842 F.2d at 357 (RICO prosecution; continuing illegal activity not mere cover-up and held in furtherance).

69. 11 F.3d at 324-25.

70. *Id.* at 325.

71. *Salerno*, 868 F.2d at 528.

72. *Id.*

73. *Id.* at 533.

74. 715 F.2d at 825; *see also Leisure*, 844 F.2d at 1363 (common purpose was to profit from domination of local labor union and murder adversaries); *Kragness*, 830 F.2d at 856-57 (common purpose was "to import, receive, conceal, buy, sell, and otherwise deal in narcotic and dangerous drugs"); *Ford Motor Co.*, 646 F. Supp. at 999 (common purpose was "the marketing, sales, and distribution of the [stolen] parts and packaging").

v. *Flynn*,<sup>75</sup> the government specified that the purpose of the enterprise was

to enrich its members financially; to murder leaders and members of rival groups, organizations, and families; to retaliate against leaders and members of rival groups, organizations, and families for acts committed against associates of the enterprise; to avoid, discover and obstruct investigations and prosecutions of associates and activities of the enterprise by law enforcement officials.

e. *Proof of Continuity*: The Fifth Circuit describes its unique continuity requirement for an enterprise as the “linchpin of enterprise status.”<sup>76</sup> The purpose of this element in the Fifth Circuit is to limit the reach of civil RICO actions; it was imposed on RICO when the Fifth Circuit followed the least restrictive “pattern” requirement.<sup>77</sup> While its unique pattern view no longer controls, it retains its continuity requirement for the “enterprise” element. In general, “[t]he enterprise must have continuity of its structure and personnel, which links the defendants; and a common or shared purpose.”<sup>78</sup> Similarly, in *Kragness*,<sup>79</sup> the Eighth Circuit, which follows its own special view of “enterprise,” considered whether continuity of structure and personnel existed within an alleged drug organization. The court recognized that “[c]ontinuity of structure [may] exist where there is an organizational pattern or system of authority that provides a mechanism for directing the group’s affairs on a continuing, rather than an ad hoc, basis.”<sup>80</sup>

The Eighth Circuit generally holds, however, that neither the structure nor the personnel must remain constant; changes may (and often do) occur without causing the enterprise to lose its identity. In *Kragness*,<sup>81</sup> for example, the court found that while several of the organization’s members joined and subsequently left the enterprise, its primary leaders remained throughout the organization’s existence, and the organization, in fact, expanded. In contrast, in *Calcasieu*,<sup>82</sup> the Fifth Circuit determined that the plaintiffs failed to allege that continuity existed because the enterprise’s goal was only a “single, short-term” one, that is, to acquire fraudulently an interest in a mineral development partnership. Similarly, in *Riccobene*, the Third Circuit applied its three-prong standard, a variation of the Eighth Circuit’s view. The government charged several members of the Philadelphia organized crime family under § 1962(d) with conspiracy to violate § 1962(c).<sup>83</sup> On appeal, defendants contended that the government failed to prove the existence

75. 852 F.2d 1045, 1051-52 (8th Cir.), cert. denied, 488 U.S. 974 (1988).

76. *Ocean Energy II*, 868 F.2d at 749. It imposes a similarly unique requirement on the “person.” *Landry*, 901 F.2d at 425 (quoting *Delta Truck & Tractor*, 855 F.2d at 242).

77. See *R.A.G.S. Courture, Inc. v. Hyatt*, 774 F.2d 1350, 1355 (5th Cir. 1985) (two acts of mail fraud in a single transaction held sufficient for pattern).

78. *Calcasieu*, 943 F.2d at 1462 (quoting *Shaffer v. Williams*, 794 F.2d 1030, 1032-33 (5th Cir. 1986)).

79. 830 F.2d at 856 (citing *Bledsoe*, 674 F.2d at 665 and *Lemm*, 680 F.2d at 1199).

80. *Id.*

81. 830 F.2d at 856-57.

82. 943 F.2d at 1462.

83. 709 F.2d at 220, 221.

of an enterprise, as required under § 1962(c).<sup>84</sup> The court described the “ongoing organization” requirement as relating “to the superstructure or framework of the group. [As revealed above, to] satisfy this element, the government must show that some sort of structure exists within the group for the making of decisions, whether it be hierarchical or consensual.”<sup>85</sup> The evidence revealed that the organization possessed a distinct leader and a group of supervisors.<sup>86</sup> The members of the enterprise worked together to earn greater profits, the common purpose of the enterprise. The court held that continuity must be present, not only in structure, but also in the organization’s members’ roles. Nevertheless, the court recognized that:

this does not mean that individuals cannot leave the group or that new members cannot join at a later time. It does require, however, that each person perform a role in the group consistent with the organizational structure established by the first element and which furthers the activities of the organization.”<sup>87</sup>

The court concluded that the various members’ roles remained relatively constant throughout the enterprise’s existence and that these roles conformed with the enterprise’s structure.<sup>88</sup>

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84. *Id.* at 216.

85. *Id.* at 222.

86. *Id.* at 217.

87. *Id.* at 223.

88. *Id.*

## APPENDIX H (EXTORTION)

In *NOW v. Scheidler*,<sup>1</sup> respondents raised two issues: (1) the scope of “enterprise” in RICO beyond “economic motive” and (2) the scope of the Hobbs Act<sup>2</sup> “extortion” beyond “obtaining property.” The Court did not reach the Hobbs Act issue, and it expressed “no opinion upon it.”<sup>3</sup> A series of courts of appeals decisions, however, extends “extortion” in the Hobbs Act beyond its common law roots of obtaining property.<sup>4</sup> In brief, that extension conflates “extortion” (obtaining property for self or another) with “coercion” (requiring another to do or not do something). Extortion protects property; coercion protects autonomy. While the concepts may overlap, they are distinguishable; and the distinction animates general criminal jurisprudence. That extension is also commonly reflected in dicta in other Hobbs Act decisions.<sup>5</sup> The extension is unjustified and unjustifiable. It raises significant implications for litigation involving First Amendment activities and commercial relations. It is inconsistent with principles of statutory construction, including the plain meaning rule, the rule for construing legislative text borrowed from another jurisdiction, the rule for interpreting common terms, the rule of lenity, and First Amendment considerations.

1. *Text of Hobbs Act*: Title 18 U.S.C. § 1951(a) (1994), in relevant part, provides: “(a) Whoever obstructs, . . . by . . . extortion or attempts or conspires so to do, . . . shall be imprisoned not more than twenty years, or both.”

Title 18 U.S.C. § 1951(b)(2) (1994), in relevant part, provides: “The term “extortion” means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.”

2. *Plain Meaning*: Statutory interpretation begins with text.<sup>6</sup> Words are to be given their ordinary meaning.<sup>7</sup> The ordinary meaning of “obtaining. . .from” is

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1. 114 S. Ct. 798 (1994).

2. 18 U.S.C. § 1951(a)(1994).

3. 114 S. Ct. at 801-02.

4. *Libertad v. Welsh*, 53 F.3d 428, 438 n.6 (1st Cir. 1995) (citing *Northwest Women Center, Inc.*); *NOW v. Scheidler*, 968 F.2d 612, 629-30 n.17 (7th Cir. 1992) *aff'd on other grounds*, 114 S. Ct. 798 (1994); *Northwest Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1350 (3rd Cir.), *cert. denied*, 493 U.S. 901 (1989). One of our member (Blakey) was a counsel for petitioners on certiorari in *Northeast Women Center* and respondents in *NOW*.

5. See, e.g., *United States v. Stillo*, 37 F.3d 553, 559 (7th Cir. 1995) (“[A]n extortionist can violate the Hobbs Act without extra seeking or receiving money or anything else. A loss to, or interference with the rights of, the victim is all that is required”) (citing *United States v. Lewis*, 797 F.2d 358, 364 (7th Cir. 1986) (attempted extortion; extortion illustration involving destruction, not obtaining), *cert. denied*, 479 U.S. 1093 (1987)); *United States v. Frazier*, 560 F.2d 884, 887 8th Cir. 1977) (attempted extortion; gravamen of extortion said to be “loss to victim”) *cert. denied* 435 U.S. 968 (1978); *United States v. Hyde*, 448 F.2d 815, 843 (5th Cir. 1971) (extortion; stock sold to third party; gravamen of extortion said to be “loss to victim,” not obtaining perpetrator or third party) *cert denied*, 404 U.S. 1058 (1972).

6. *United States v. Turkette*, 452 U.S. 576, 580 (1981).

7. *Russello v. United States*, 464 U.S. 16, 32 (1983).

“get.”<sup>8</sup> Its principal usage in the English language is to “come into possession or enjoyment of [something]. . . to acquire [or] get.”<sup>9</sup> “Obtaining. . . from” is not synonymous with “to part with,” which means “to let go, give up [or] surrender.”<sup>10</sup>

3. *Text Borrowed by Legislature*: When a legislature borrows language of a statute from the jurisprudence of another jurisdiction, the language must be construed in the sense in which the other jurisdiction used it.<sup>11</sup>

The Hobbs Act took its definition of “extortion” from New York law.<sup>12</sup> New York law was codified in the Field Code of 1865, which defined extortion as “[t]he obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right.”<sup>13</sup> In the commentary to Chapter IV § 584 (larceny), the Field Code Commissioners observed:

Four of the crimes affecting property require to be somewhat carefully distinguished; robbery, larceny, extortion, and embezzlement. . . . *All four include the criminal acquisition of the property of another.* . . . In extortion, there is again a taking. . . . Thus extortion partakes in an inferior degree of the nature of robbery, and embezzlement shares that of larceny.<sup>14</sup>

New York jurisprudence requires a “taking” for extortion.”<sup>15</sup> “Depriving”

8. 10 THE OXFORD ENGLISH DICTIONARY 669-70 (2d ed. 1983).

9. *Id.*

10. 11 THE OXFORD ENGLISH DICTIONARY 262 (2d ed. 1983).

11. See, e.g., *Metropolitan R.R. Co. v. Moore*, 121 U.S. 558, 572 (1887) (“construed in the sense in which they were understood at the time in that system from which they were taken”); *Willis v. Eastern Trust & Banking Co.*, 169 U.S. 295, 307-08 (1887) (same).

12. *Evans v. United States*, 112 S. Ct. 1881, 1886 n.9, 1887 (1992); *United States v. Enmons*, 410 U.S. 396, 406 n.16 (1973). The relevant legislative materials are ably reviewed in *United States v. Mazzie*, 521 F.2d 639, 651-55 (3rd Cir.) (Gibbons, J. in dissent), *cert. denied*, 423 U.S. 1014 (1975).

13. PENAL CODE OF THE STATE OF NEW YORK, REPORTED COMPLETE BY THE COMMISSIONERS OF THE CODE § 613 p.220 (1865) (emphasis added).

14. *Id.* § 584 at 210-11 (emphasis added).

15. *Enmons*, 410 U.S. at 406 n.16 (under New York law, “extortion requires an intent to obtain that which in justice and equity the party is not entitled to receive”; accused must be “actuated by the purpose of obtaining a financial benefit” such as “receiv[ing] a payoff”) (emphasis added; quoting and citing New York cases). See, e.g., *People v. Whaley*, 6 Cow. 661, 663 (N.Y. 1827) (“[e]xtortion . . . signifies the taking of money” with corrupt intent) (cited in commentary to Field Code of 1865 § 613 (extortion)); *People v. Ryan*, 232 N.Y. 234, 235, 133 N.E. 572, 573 (1921) (blackmail prosecution) (an intent “to extort” requires an accompanying intent to “gain money or property”; mere threat to injure a business is insufficient); *People v. Squillante*, 18 Misc. 2d 561, 564, 185 N.Y.S.2d 357, 361 (Sup. Ct. 1959) (“‘[o]btaining of property from another’ imports not only that he give up something but that the obtainer receive something”). Compare *People v. Griffin*, 2 Barb 427, 430 (N.Y. 1848) (“intent to extort” interpreted, as in a robbery-type offense, to mean “to obtain that which in justice and equity the party is not entitled to receive,” that is, “*lucri causa*”), with *People v. Barondess*, 61 Hunt 571, 575-76 (N.Y. 1891) 133 N.Y. 649, 653-54 (1892) (“At common law, extortion. . . was defined to be the taking of money. . . . [As codified, it] completes the legislation against robbery. . . .”), *rev’d on other grounds*, 133 N.Y. 649 (1892). California extortion law is also derived from the Field Code. Similar comments appear in the COMMENTARY TO THE PENAL CODE OF 1870, Chapter VI, § 371 (embezzlement). Extortion is defined in § 383; its commentary, as in the Field Code in New York, is cross referenced to § 371. See also *People v. Anderson*, 95 Cal. 408, 415-16, 211 P.257, 261-62 (1922) (the taking in robbery and extortion distinguished); *People v. Peck*, 43 Cal. 638, 639-40, 185 P. 881, 882-83 (1919) (the taking in robbery and extortion distinguished).

another of property is not “extortion.” That, too, is how the Hobbs Act should be read.

4. *Definition of Extortion at Common Law and in Modern Statutes:* A “statutory term is generally presumed to have its common law meaning.”<sup>16</sup> That rule is followed unless the term is obsolete, or inconsistent with the statute’s purpose.<sup>17</sup> The rule informs the Supreme Courts reading of “extortion” in the Hobbs Act.<sup>18</sup>

a. *Common Law “Extortion”:* While the common law definition of “extortion” varies from treatise to treatise, “extortion” was a *property* offense. Blackstone<sup>19</sup> described extortion as:

an abuse of public justice which consists in an officer’s unlawfully *taking*, by colour of his office, from any man, *any money or thing of value*, that is not due to him, or more than is due or before it is due.<sup>20</sup>

Another influential treatise writer, Lord Coke, observed:

[e]xtortion, in its proper sense, is a great misprision, by wresting or unlawfully *taking* by any officer, by colour of his office, *any money or valuable thing*. . . either that is not due, or more than is due, or before it be due. . . .<sup>21</sup>

Hawkins, too, took a similar stand:

extortion in a large sense signifies any oppression under colour of right; but that in a strict sense, it signifies the *taking of money* by any officer, by colour of his office, either where none at all is due, or not so much is due, or where it is not yet due.<sup>22</sup>

Unquestionably, the common law definition of extortion required the *acquisition of property*, a “taking,” not a “depriving.”

b. *Statutory “Extortion.”*

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16. *Taylor v. United States*, 495 U.S. 575, 592 (1990) (“burglary”); *United States v. Turley*, 352 U.S. 407, 711 (1957) (“steal”); *Morissette v. United States*, 342 U.S. 246, 263 (1952) (“where Congress borrows terms of art. . . it is presumably knows and adopts the cluster of ideas that were attached to each borrowed word”).

17. *Taylor* 495 U.S. at 594 (citing *Perrin v. United States*, 444 U.S. 37, 45 (1979) (§ 8 U.S.C. § 1952 (“bribery”)); *United States v. Nardello*, 393 U.S. 286, 289-96 (1969) (18 U.S.C. § 1952 (“extortion”)); *Bell v. United States*, 462 U.S. 356, 362 (1983) (18 U.S.C. § 2113 (“robbery”))).

18. *Evans*, 112 S. Ct. 1881, 1885-89 (quoting *Morissette*, 342 U.S. at 263).

19. “The definition of common law extortion that writers on the Hobbs Act most frequently cite is Blackstone’s. . . .” James Lindgren, *The Elusive Distinction Between Bribery and Extortion; from the Common Law to the Hobbs Act*, 35 UCLA L. Rev. 815, 862 (1988).

20. 4 WILLIAM BLACKSTONE, COMMENTARIES 141 (1769) (emphasis added). Case law agrees. *See, e.g., Rex v. Burdett*, [1792] 1 Ld. Raym. 149, 150, 91 Eng. Rep. 996, 997 (it is not the injury to “free liberty to sell their wares in the market” or “the extorsive agreement. . . [that] is. . . the offense, but the taking. . .”).

21. 3 EDWARD COKE, FIRST INSTITUTE 584 (J. Thomas ed. 1826) (emphasis added).

22. WILLIAM HAWKINS, A TREATISE OF THE PLEASE OF THE CROWN 316 (6th ed. 1788) (emphasis added). “Hawkin’s definition of extortion was cited, paraphrased, or followed by the Crown Circuit Companion, Mathew Bacon in A New Abridgement of the Law, William Russell in A Treatise on Crimes and Misdemeanors, and Francis Wharton in his influential American treatise, A Treatise on the Criminal Law.” Lindgren, *supra* APPENDIX H note 19 at 865 (footnotes omitted).



Appropriately, the Model Penal Code, promulgated in 1962, maintains the distinction between the (originally common-law) crime of "extortion" and the (originally statutory) crime of "coercion." Section 212.5 "prohibits specified categories of threats made with the purpose of unlawfully *restricting another's freedom of action* to his detriment."<sup>23</sup> Section 223.4, however, "deals with situations where threat . . . is the method employed to *deprive the victim of his property*."<sup>24</sup> The obtaining of property distinguishes extortion from coercion as coercion involves the restriction of another's freedom of action by threat.

Many states follow the Model Penal Code and distinguish "extortion" and "coercion" by categorizing them as separate statutory offenses.<sup>25</sup> A second group of states recognize only the crime of "extortion," not "coercion."<sup>26</sup> Other states combine the two offenses under one heading.<sup>27</sup> "The distinction is not trivial: . . . it is of the essence of extortion—not only in New York law, but more importantly, in the law generally—that one compel another to surrender property."<sup>28</sup> In brief, "coercion" was unknown to the common law.<sup>29</sup> Since the Model Penal Code, moreover, the distinction between "extortion," a common law offense, and

23. MODEL PENAL CODE AND COMMENTARIES § 212.5 at 264 (1980) (emphasis added).

24. *Id.* § 223.4 at 201 (emphasis added).

25. ALA. CODE §§ 13A-8-13, 13A-6-25 (1982); ALASKA STAT. §§ 11.41.520, 11.41.530 (1989); ARK. CODE ANN. §§ 5-36-103(a)(2), 5-13-208 (Michie 1987 & Supp. 1991); COLO. REV. STAT. ANN. § 18-3-207 (coercion labelled extortion), § 18-4-401 (consolidated theft) (West 1990); DEL. CODE ANN. TIT 11, §§ 846, 791 (Supp. 1992); MISS. CODE ANN. § 97-3-81 (extortion labelled robbery), § 97-3-87 (coercion labelled whitecapping) (1973); MONT. CODE ANN. §§ 45-6-301(2), 45-5-203 (1991); NEV. REV. STAT. ANN. §§ 205.320, 207.190 (Michie 1992); N.J. STAT. ANN. §§ 2C:20-5, 2C:13-5 (West 1982); N.Y. PENAL LAW §§ 155.05(2)(e) (McKinney 1988), 135.60 (McKinney 1987); N.D. CENT. CODE §§ 12.1-23-02(2), 12.1-17-06 (1985); OHIO REV. CODE ANN. §§ 2905.11, 2905.12 (Anderson 1993); OR. REV. STAT. §§ 164.075, 163.275 (1990); 18 PA. CONS. STAT. ANN. §§ 3923, 2906 (Purdon 1983); WASH. REV. CODE ANN. §§ 9A.56.110, 9A.36.070 (1988).

26. ARIZ. REV. STAT. ANN. § 13-1804 (1989); CAL. PENAL CODE § 518 (1988); CONN. GEN. STAT. ANN. § 53a-119(5) (West Supp. 1993); GA. CODE ANN. § 16-8-16 (1992); IDAHO CODE § 18-2403(2)(e)(1987); ILL. ANN. STAT. ch. 38, para. 16-1(a)(3)(Smith-Hurd Supp. 1992); IND. CODE ANN. §§ 35-45-2-1, 35-43-4-1(b)(7) & 35-43-4-2 (Burns Supp. 1992); IOWA CODE ANN. § 711.4 (West 1979); KY. REV. STAT. ANN. § 514.080 (Baldwin 1984 & Supp. 1992); LA. REV. STAT. ANN. § 14:66 (West 1986); ME. REV. STAT. ANN. tit. 17-A § 355 (1983); MD. CRIM. LAW CODE ANN. § 562B (1992); MO. ANN. STAT. § 570.030 (Vernon Supp. 1993); NEB. REV. STAT. § 28-513 (1989); N.H. REV. STAT. ANN. § 637:5 (1986); N.C. GEN. STAT. § 14-118.4 (1986); S.C. CODE ANN. § 16-17-640 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 22-30A-4 (1988); TEX. PENAL CODE ANN. § 31.03 (West 1989); UTAH CODE ANN. § 76-6-406 (1990); VA. CODE ANN. § 18.2-59 (1988); W.VA. CODE § 61-2-13 (1992).

27. See FLA. STAT. ANN. § 836.05 (West 1976); HAW. REV. STAT. § 707-764 (1988); MASS. GEN. LAWS ANN. ch. 265, § 25 (West 1990); MICH. COMP. LAWS ANN. § 750.213 (West 1991); MINN. STAT. ANN. § 609.27 (West 1987); N.M. STAT. ANN. § 30-16-9 (1984); R.I. GEN. LAWS § 11-42-2 (Supp. 1992); TENN. CODE ANN. § 39-14-112 (1991); VT. STAT. ANN. tit. 13, § 1701 (Supp. 1992); WIS. STAT. ANN. § 943.30 (West 1982); WYO. STAT. § 6-2-402 (1988), Cf. KAN. STAT. ANN. §§ 21-3701(c) (theft by threat), 21-3428 (coercion and extortion together) (1988); OKLA. STAT. ANN. tit. 21, §§ 1481 (extortion), 1488 (coercion and extortion together under blackmail) (West 1983).

28. *United States v. Private Sanitation Industry Ass'n*, 793 F. Supp. 114, 1132 (E.D.N.Y. 1992) (18 U.S.C. § 1961(1) ("extortion"); "coercion" not "extortion:" (citing *Mardello*, 393 U.S. 286, 296 (1969); accord, *Center Cadillac v. Bank Leumi Trust Co.*, 808 F. Supp. 213, 231-32 (S.D.N.Y. 1992) ("coercion . . . not among . . . laws . . . providing a basis for RICO liability"). See also *United States v. Delano*, 35 F.3d 720, 726, n.3 (7th Cir. 1995) (New York extortion requires obtaining property; it does not include theft of services; the inclusion of "coercion" in "extortion" for RICO not decided).

29. See, e.g., *State v. Ullman*, 5 Minn. 1, 2 (1861).

"coercion," a statutory innovation, remains valid.<sup>30</sup> Maintaining the distinction in "extortion" in the Hobbs Act is a matter of reading the statute. If the common law distinction is to be abandoned, Congress ought to have to act.<sup>31</sup>

5. *Lenity*: Where two constructions of a term are plausible, the basic principle of lenity requires that the narrower construction be adopted.<sup>32</sup> Extending "extortion" to "coercion" violates the principle of lenity.

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30. See generally, Sanford Kadish, *The Model Penal Code's Historical Antecedents*, 19 RUTGERS L.J. 521, 5389 (1988):

The Model Penal Code has become. . .the principal text in criminal law teaching, the point of departure for criminal law scholarship, and the greatest single influence on the many new state codes. . . .\*\*\*The success of the Model Penal Code has been stunning. Largely under its influence, well over half the states have adopted revised penal codes. . . .

The MODEL PENAL CODE AND COMMENTARIES § 223.4 at 203 (1980) observes:

[B]ehavior prohibited by this section [theft by extortion] is closely analogous to that proscribed as criminal coercion under Section 212.5\*\*\*The major difference lies in the purpose and effect of the coercive and extortionate threats. Criminal coercion punishes threats made 'with purpose unlawfully to restrict another's freedom of action to his detriment.' while extortion is included within the consolidated offense of theft because it is restricted to one who 'obtains property of another by' threats.

*Id.* at § 212.5 at 266, explains:

It is arguable that these categories of threat [theft by extortion] should be included in the offense of criminal coercion. . . . The judgment underlying the Model Code, however, is that the underlying wrong in extortion—obtaining property to which the actor knows he is not entitled—provides a more reliable basis for punishment than does the Section 212.5 requirement of a 'purpose unlawfully to restrict another's freedom of action to his detriment.'

31. *Northwestern Bell Telephone Co. v. H.J. Inc.*, 492 U.S. at 249 ("a job for Congress. . .not this court.") (quoting *Sedima*, 473 U.S. at 495). The point is rooted deeply in history. See, e.g., CECSARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 12-13 (Legal Classic Ed. 1991) ("Judges, in criminal cases, have no right to interpret the penal laws, because they are not legislators. . . , that is, the representatives of society, and not the judge, whose office is only to examine, if a man have, or have not committed an action contrary to the laws.") "Interpretation" in the 18th century did not necessarily have a neutral connotation. See VII OXFORD ENGLISH DICTIONARY 1131-32 (2nd ed. 1989). Nor does it today. See ROSCOE POUND, JURISPRUDENCE at 250 (1959) (distinguishing between "genuine" and "spurious" interpretation). Federalism counsels similar restraint. *Rewis v. United States*, 401 U.S. 808, 812 (1971) (expansive interpretation that alters sensitive federal-state relationships and taxes federal resources should be avoided); see also *United States v. Lopez*, 116 S. Ct. 1867 (1995) (federal offense to possess firearm within 1000 feet of school invalid). While RICO should be liberally construed, its predicate offenses, including extortion, must be read strictly. See, e.g., *Robert Suris General Contractor Corp. v. New Metropolitan Fed. S. & L. Ass'n*, 873 F.2d 1401, 1405 (11th Cir. 1989) (failure to perform contract not RICO extortion); *Union Nat'l Bk v. Fed. Nat'l Mortg Ass'n*, 860 F.2d 847, 856-57 (8th Cir. 1988) (exercise of contract right not RICO extortion); *First Pacific Bancorp Inc. v. BRO*, 847 F.2d 542, 547 (9th Cir. 1988) (threat to sue not RICO extortion); *I.S. Joseph Co. Inc. v. Lauritzen*, 751 F.2d 265, 267 (8th Cir. 1984) (even groundless threat to sue not RICO extortion); *Iden v. Adrian Buckhannon Bank*, 661 F. Supp. 234, 237-39 (N.D. W.Va. 1987) (bank workout plan not RICO extortion).

32. *Dowling v. United States*, 473 U.S. 207, 216-18 (1984) (18 U.S. § 2314 (goods "obtained by fraud")) ("[w]hen assessing the reach of a federal criminal statute, we must pay close heed to language, legislative history, and purpose in order strictly to determine the scope of the conduct the enactment forbids. Due respect for the prerogative of Congress in defining federal crime prompts restraint in this area, where we typically find a 'narrow interpretation' appropriate.") (citing *United States v. Wiltberger*, 5 Wheat. 76, 95 (1820) (Marshall, C.J.) ("It is the legislature, not the court, which is to define a crime, and ordain its punishment.")); *McNally v. United States*, 383 U.S. 356, 359-60 (1987) (18 U.S.C. § 1341 ("to defraud"; "to choose the harsher only when Congress has spoken in clear and definite language")) (citing *United States v. Bass*, 404 U.S. 336, 347 (1971)).

6. *First Amendment Considerations*: Constructions of statutes that might infringe on First Amendment freedoms should be avoided.<sup>33</sup> Equating demonstrations with "extortion" endangers political and religious free speech.<sup>34</sup> Peaceful picketing and leafletting on streets and sidewalks are expressive conduct of the highest order.<sup>35</sup> Even though picketing inflicts economic injury, it is not unlawful.<sup>36</sup> "Speech does not lose its protected character simply because it may embarrass others or coerce them into action."<sup>37</sup> To be sure, substantial constitutional limits are placed on civil litigation that threatens First Amendment freedoms.<sup>38</sup> Nevertheless, equating demonstrations—religious, political, or economic—with "extortion" does not meet the "heavy" burden demanded by the First Amendment in this sensitive area to safeguard expressive "constitutionally protected activity." "Extortion" should be left in its common law mold.

7. *Critique of Northeastern Women's Center v. McMonagle*: In *Northeast Women's Center v. McMonagle*,<sup>39</sup> the Third Circuit upheld a district court's

33. See, e.g., *DeBartolo Corp. v. Fla. Gulf Coast Bldg Const.*, 485 U.S. 568, 574-88 (1988) (National Labor Relation Act § 8(b)(4)(ii)(B) ("threaten, coerce, or restrain"); see also *City of Houston, Texas v. Hill*, 482 U.S. 451, 461 (1987) (verbal challenges to activities of another); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (leafletting against discriminatory real estate practices); *Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969) (gathering to march, sing, and chant); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (same); *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940) (proselytizing in public places); *Lovell v. Griffin*, 303 U.S. 444, 452 (1938) (distribution of literature). Legislation that would attempt to regulate such activities has to be "narrowly tailored" as to time, place and manner. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

34. See generally Anthonio Califa, *RICO Threatens Civil Liberties*, 43 VAND. L. REV. 805, 860 (1990) ("using RICO in ideological disputes is inappropriate and harmful because it results in the chilling of First Amendment Rights." Anne Melley, *The Stretching of Civil RICO: Pro-Life Demonstrators Are Racketeers?* 56 UMKC L. REV. 287, 309-312 (1988); Nat Hentoff, *The RICO Dragnet*, THE WASHINGTON POST, May 13, 1989, at A-19, col. 1.

35. *United States v. Grace*, 461 U.S. 171, 176-78 (1984).

36. *Organizations for a Better Austin v. Keefe*, 402 U.S. 445, 418-20 (1971) ("The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment.").

37. *Claiborne Hardware*, 458 U.S. at 910; see also *id.* ("[t]o the extent that the lower court's judgment rests on the ground that 'many' black citizens were intimidated' by 'threats' of 'social ostracism, vilification, and traduction,' it is flatly inconsistent with the First Amendment"); *Police Department of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); *Organization for a Better Austin v. Keefe*, 402 U.S. 45, 419 (1971) ("[t]he claim that the expressions were intended to exercise a coercive impact on respondent [a realtor] does not remove them from the reach of the First Amendment."); *Watts v. United States*, 394 U.S. 705, 708 (1969) ("[t]he language of the political area. . . is often vituperative, abusive, and inexact"); *Cox v. Louisiana*, 379 U.S. 536, 551-52 (1965) ("[A] function of free speech . . . is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest . . . or even stirs people to anger") (citations omitted); *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) ("profound national commitment to the principal that debate on public issues should be uninhibited, robust and wide open").

38. *Claiborne Hardware*, 458 U.S. at 916 ("precision of regulation") (citing *NAACP v. Button* 371 U.S. 415, 438 (1963)). Any group sued and each individual member of it must be shown to possess a purpose to engage in unlawful activity, not engage in lawful activity, and only those losses that are proximately caused by the unlawful conduct, not the lawful conduct, may be remedied. 458 U.S. at 918-21.

39. 868 F.2d 1342, 1349-50 (3rd Cir.), cert. denied, 493 U.S. 901 (1989).

instructions on "extortion" phrased in terms of "to part with"<sup>40</sup> in the context of a suit by an abortion clinic against forty two individual protestors under RICO. The conduct in question was over nine years of protest activity, consisting of demonstrations, picketing in public *fora*, chanting, leafletting, and other conduct protected by the First Amendment. RICO liability for conspiracy and attempted extortion was premised on one or more of four sit-ins; claims for relief were also brought for trespass and intentional interference with contractual relations. Based on a finding of injury in the amount of \$887 to suction aspirator devices and other equipment during one sit-in by an unidentified party, defendants were held liable under RICO for treble damages and \$65,000 in attorneys fees. The jury also awarded \$42,000 in damages for trespass attributable to plaintiffs' increased cost of doing business as a result of defendants' protest.<sup>41</sup> The Third Circuit's bald assertion that the defendants proffered no point for charge on the need to prove that property was "obtained" is false.<sup>42</sup> The Third Circuit then cited<sup>43</sup> three decisions to support its innovative view: *United States v. Cerelli*,<sup>44</sup> *United States v. Starks*,<sup>45</sup> and *United States v. Anderson*.<sup>46</sup> None of these decisions, however, stands for the proposition that a "taking" is *not* required for an extortion. Unremarkably, *Cerelli* holds that the extortionist need not take the property himself; a political party may be the recipient of the extorted contributions.<sup>47</sup> *Starks* holds that a religious purpose does not preclude finding an extortion where money was, in fact, taken. Finally,

40. 689 F. Supp. 465, 472 (E.D. Pa. 1988).

41. No effort was made under *Claiborne Hardware*, 458 U.S. at 918-21 in the District Court to apportion the increased costs between the lawful protest and the unlawful sit-ins. In fact, 72% of these expenditures were made at a location different from that at which the sit-in occurred and a portion of the remainder of which was expended at a time prior to the first of the four sit-ins. See *McMonagle v. Northeast Women's Center, Inc.*, 670 F. Supp. 1300, 1308 (E.D. Pa. 1987).

42. Compare 868 F.2d at 1349-50, with *McMonagle v. Northeast Women Center, Inc.* No. 88-2137, October Term, 1988, United States Supreme Court, Petition for Charter, Petitioner's Appendix p.163 (Defendants Exhibit 5-5—Points for Charge on Extortion). In fact, counsel for the defendant interposed this objection:

Mr. Stanton:

Your Honor, I have a comment on the extortion [instruction]. I am looking at the jury instruction from New York, New York Standard Criminal Jury Instruction on extortion and it does say that the property can't be just surrendered. The property has to be appropriated by the alleged extortionee [sic] third person. The impression is left from this instruction that if somebody surrendered something, including an intangible property right, that's all that's necessary. There has to be a showing something was appropriated, by the person committing the extortion or then transferred to a third-party and that the problem I have with this instruction. It leaves the impression if somebody surrendered that [sic] all that's necessary.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit, No. 88-2137, United States Supreme Court, October Term, 1988. *McMonagle v. Northeast Women's Center, Inc.*, at 26 n.29.

43. 868 F.2d at 1350.

44. 603 F.2d 415, 420 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980).

45. 515 F.2d 112, 124 (3rd Cir. 1975), *cert. denied*, 431 U.S. 651 (1977).

46. 716 F.2d 446 (7th Cir. 1983).

47. See, e.g., *United States v. Green*, 350 U.S. 415, 418-20 (1955) (18 U.S.C. § 1951 (extortion); statutes not limited to obtaining property for personal benefit, but extends to union official who uses unlawful fear to obtain jobs and pay for union members.).

*Anderson* dealt not with the "obtaining from" element of "extortion," but with the failure to give "kidnapping" instructions. The record, however, included evidence that the victim, a doctor, who performed abortions, was extorted of \$300. Remarkably, the Third Circuit left unmentioned its own controlling precedent, *United States v. Sweeney*,<sup>48</sup> which recognized that "extortion" under the Hobbs Act was a "larceny-type offense." *McMonagle*, in short, is unpersuasive. Nor should *Scheidler*<sup>49</sup> or *Libertad*<sup>50</sup> be given particular attention; they merely track the *McMonagle* result without adding independent analysis of their own of the text of the statute or its New York or common law backgrounds, much less the relevant considerations of statutory interpretation. No court of appeals or district court outside of the Third, Seventh, or First Circuits ought to feel bound to follow the tainted *McMonagle* line of decisions. District court decisions like *Private Sanitation* are well-reasoned and rightly decided; they should be followed. The Supreme Court or Congress ought to reverse *McMonagle* and its progeny; they threaten First Amendment values<sup>51</sup> and they raise the specter of unwisely turning commercial transactions involving "hard bargains" into "extortion" litigation under RICO.

Holmes aptly observed:

[T]he word 'threats' often is used as if, when it appeared that threats had been made, it appeared that unlawful conduct had begun. But it depends on what you threaten. As a general rule, even if subject to some exceptions, what you may do in a certain event you may threaten to do—that is, give warning of your intention."<sup>52</sup>

Not every "commercial dispute" involving a "hard bargain," in short, ought—even potentially—to be elevated into a RICO violation simply by calling it "extortion." Such issues are best left to the state law of economic duress or

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48. 262 F.2d 272, 275 (3rd Cir. 1959) (citing *United States v. Nedley*, 255 F.2d 350 (3rd Cir. 1958)). See also *United States v. Agnes*, 753 F.2d 293, 297 (3rd Cir. 1985) (Hobbs Act taken from N.Y. law; "was to be the same"; "wrongful" not include claim-of-right).

49. 968 F.2d at 629-30 and n.17 ("The Hobbs Act. . .does not require that the defendant profit economically from the extortion") (citing *Town of West Hartford v. Operation Rescue* 915 F.2d 92, (2nd Cir. 1990); *United States v. Anderson*, 716 F.2d 446 (7th Cir. 1983); *United States v. Starks*, 515 F.2d 112 (3rd Cir. 1975). The Seventh Circuit missed the point: not "personal profit," but "property obtained"—by either the perpetrator or a third party. The irrelevancy of *Anderson* and *Starks* on this point is set out in the text; *Town of West Hartford* is similarly irrelevant; it assumed *arguendo* that the defendant's conduct constituted extortion of the clinic, but then denied the towns claim for injury to its property for extortion. 915 F.2d at 102. ("So bizarre a constitution of the Hobbs Act affronts common sense, much less the rule of lenity. . . . [W]herever RICO claim the center may have. . .there is no plausible basis for its assertion by the town.").

50. 53 F.3d at 438 n.6 ("The record. . .shows. . .[defendant's] tactics include the intentional infliction of property damage, and directly result in the clinics loss of business. It is difficult to conceive of a set of facts that more clearly sets for the extortion [under the Hobbs Act]").

51. Compare *Wurtz v. Risley*, 719 F.2d 1438, 1441-42 (9th Cir. 1983) ("intimidation provision held facially overbroad), with *State v. Ross*, 269 Mont. 347, 350, 889 P.2d 161, 163 (1995) (revised and narrowed, MONT. CODE ANN § 45-5-203 (1995) intimidation statute upheld).

52. See *Vegehlam v. Gunter*, 167 Mass. 92, 107, 44 N.E. 1077, 1081 (1896).

business compulsion. The Supreme Court of Wisconsin in *Wurtz v. Fleschman*<sup>53</sup> observed:

[T]he basic elements of economic duress are . . .

1. The party alleging economic duress must show that he has been the victim of a wrongful or unlawful act or threat, and
2. Such act or threat must be one which deprives the victim of his unfettered will.

As a direct result of [the coming together of] these elements, the party threatened must be compelled to make a disproportionate exchange of value or to give up something for nothing. If the payment or exchange is made with the hope of obtaining a gain, there is not duress; it must be made solely for the purpose of protecting the victim's business or property interests. Finally, the party threatened must have no adequate legal remedy. . . [Professor] Williston emphasizes that *merely driving a hard bargain or taking advantage of another's financial difficulty is not duress*.<sup>54</sup>

Economic duress or business compulsion, in fact, are not actionable in themselves; they only entitle a party to rescission.<sup>55</sup> Tort liability, too, for duress is predicated on *wrongful* conduct.<sup>56</sup> Surely, criminal or civil liability for "extortion" under the Hobbs Act and treble damages and counsel fees under RICO ought not be established by a lesser showing than that required for contract relief or general civil responsibility. If the law should be changed, then Congress ought to take that step. Congress certainly did not do it in 1970.

8. *Legislative History*: The question of abusing RICO by extending it to "coercion" comes up not only in considering the scope of the Hobbs Act, but also the scope of "extortion" in 18 U.S.C. § 1961(1)(1994). District court decisions rightly construe "extortion" to mean "extortion," not "extortion" and "coercion".<sup>57</sup> The senators and congressmen who drafted RICO knew the difference between "extortion" and "coercion." Had they meant to include "coercion," they would have said it.<sup>58</sup> Had they foreseen that courts of appeals would rewrite the Hobbs Act, they would have excluded "coercion" from it for the purposes of RICO, if not entirely. While the Supreme Court in *NOW v. Scheidler* did not find the legislative history of RICO so "clearly expressed" that the Court was willing to add to statutory language it thought was "unambiguous" on the issue of

53. 97 Wis. 2d 100, 293 N.W. 2d 155 (1980).

54. 97 Wis. 2d at 109-10, 293 N.E. 2d at 160 (emphasis added) (citations omitted).

55. RESTATEMENT (SECOND) OF CONTRACTS § 174 cmt. (1981).

56. RESTATEMENT (SECOND) OF TORTS § 871 cmt. f (1979).

57. See *United States v. Private Sanitation Industry Ass'n*, 793 F. Supp. 114, 1132 (E.D.N.Y. 1992) (18 U.S.C. § 1961(1) ("extortion"); "coercion" not "extortion") (citing *Mardello*, 393 U.S. 286, 296 (1969); accord, *Center Cadillac v. Bank Leumi Trust Co.*, 808 F. Supp. 213, 231-32 (S.D.N.Y. 1992) ("coercion . . . not among . . . laws . . . providing a basis for RICO liability").

58. *Turkette* 452 U.S. at 581 ("Had Congress . . . intended . . . [it]. . . , it could have easily . . . added the word").

"economic motive,"<sup>59</sup> that legislative history ought to be persuasive on the construction of "extortion" in 18 U.S.C. § 1961(1) (1994). It shows that Congress did not want RICO abused in the area of First Amendment freedoms.

a. *Approach to Legislative History*: When statutory language, syntax, or context—internal or external—is ambiguous,<sup>60</sup> resort to legislative history is proper.<sup>61</sup> Ultimately, however, the interpretation of a statute is "a holistic endeavor."<sup>62</sup>

The key to understanding RICO's legislative history lies in the evolution of "enterprise criminality," which, in turn, evolved against the backdrop of the Communist Party membership prosecutions in the 1950's and the Vietnam anti-war protests prosecutions in 1969-70. Nevertheless, the intent of RICO's drafters may be best understood by examining the principle of selection by which RICO's sponsors *included* and *excluded* the federal and state predicate offenses in RICO. That legislative history demonstrates that RICO's sponsors consciously focused RICO on organized crime as well as white-collar crime and that they took every opportunity to preclude its application to political or social protest.

b. *Organized Crime*: Following the Attorney General's 1950 Conference on

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59. 114 S. Ct. at 806.

60. Ambiguity is of three types: semantic, syntactical, and contextual. REED DICKERSON, *THE FUNDAMENTALS OF LEGAL DRAFTING* 25-27, 32 (1965) ("[T]he most troublesome [ambiguity is] contextual ambiguity [either internal or external, that is,] the uncertainty of whether a particular implication arises. \* \* \* [I]t is sometimes said that a draftsman should leave nothing to implication. This is nonsense. No communication can operate without leaving part of the total communication to implication. Implication is merely the meaning that context adds to express [dictionary] meaning."); see *United States v. Monia*, 317 U.S. 424, 432 (1943) ("A statute . . . cannot be severed [from its context] without being mutilated. . . . The meaning of a statute cannot be gained by confining inquiry within its four corners.") (Frankfurter, J. in dissent); *Duparquet Huot v. Moncuse Co. v. Evans*, 297 U.S. 216, 220-21 (1936) ("[H]istory is a teacher that is not to be ignored.") (Cardozo, J.).

61. The Supreme Court routinely looks to the legislative history of RICO in interpreting the statute. *Reves v. Ernst & Young*, 507 U.S. at 179-83; *Holmes*, 112 S.Ct. 1317; *Tafflin*, 493 U.S. at 461; *H.J., Inc.*, 492 U.S. at 236-39; *Monsanto*, 491 U.S., at 613; *Agency Holding Corp.*, 483 U.S., 151; *Shearson/American Express, Inc.*, 482 U.S. at 238-41; *Sedima*, 473 U.S. at 486, 489; *Turkette*, 452 U.S. at 586, 589.

62. *United States Nat'l Bank of Oregon v. Independent Insurance Agents of America*, 113 S.Ct. 2173, 2182 (1993) (quoting *United Saving Ass'n of Texas v. Timber of Inwood Forest Associates Ltd.*, 484 U.S. 365, 371 (1988)). Should legislation should be principally read with reference to its operative text? As a rule of statutory construction to be applied to legislation enacted by Congress *after* a certain date, this position has much to recommend it, but as a rule of statutory construction to be applied to statutes enacted by the Congress *before* that date and *under a contrary rule of statutory construction*, this position is open to the strictures that are leveled against retroactive legislation. See, e.g., *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 855-567 (1990) (Scalia, J., concurring). "Congress legislates with knowledge of. . . basic rules of statutory construction." *Rowland v. California Men's Colony*, 113 S.Ct. 716, 720 (1993). If those rules envision an examination of legislative history—and such an examination dictates one result, for example exculpation, but not making such an examination dictates, another result, for example, inculcation—changing the rules of statutory interpretation enlarges the scope of inculcation, contrary to the principle of legality. JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW*, 58-64 (2d ed. 1960). As such, statutes ought to be construed in light of the rules of statutory interpretation followed when they were drafted. *Daily Income Fund Inc. V. Fox*, 464 U.S. 523, 536 (1984). In 1970, when RICO was enacted, the practice of the Supreme Court was routinely to examine the legislative history of a statute. See, e.g., *Nelson v. George*, 399 U.S. 224, 228 (1970). Indeed a "Westlaw" search for "legislative history" in the decade before the enactment of the 1970 Act turns up 334 decisions of the Court. Resort to legislative history was, in short, routine.

Organized Crime, the Kefauver Committee investigated organized crime and noted its infiltration into legitimate business.<sup>63</sup> Following the Kefauver Committee's work, Senator John L. McClellan, the chairman of a number of key committees and subcommittees and subsequently one of the principal sponsors of RICO, chaired three investigations into the illegal activities of organized crime; focusing on labor racketeering, gambling, and narcotics.<sup>64</sup> These investigations examined illicit enterprises and the infiltration of organized crime into businesses as well as unions. Following these investigations, the President's Commission on Law Enforcement and Administration of Justice undertook an examination of organized crime; it focused on "enterprise criminality."<sup>65</sup> RICO's two track—criminal and civil—approach to "enterprise criminality" in the marketplace grew out of the Commission's findings and recommendations.

From 1967 to 1969, Senator McClellan and Senator Roman L. Hruska, another key Senate sponsor of RICO, also served on the National Commission on Reform of the Federal Criminal Laws. It, too, examined federal criminal law and the challenge of organized crime.<sup>66</sup> While the Commission considered a proposal on "organized crime leadership," it did not carry it forward in its final report. Nevertheless, the proposal, a predecessor of RICO, is enlightening since it focused on organized crime, not white-collar crime or political or social protest.<sup>67</sup>

c. *Illicit Enterprises*: On the basis of his hearings on organized crime, Senator McClellan introduced his syndicate bill, S. 2187, on June 24, 1965.<sup>68</sup> The bill was targeted at illicit enterprises; it was one of RICO's key precursors. S. 2187 outlawed knowingly "becom[ing] a member of (1) the Mafia or (2) any other organization having. . .[as] its purposes" engaging in certain designated offenses.<sup>69</sup> S. 2187 was Senator McClellan's first legislative effort to curtail enterprise criminality in the underworld. S. 2187 included among its designated offenses "acts. . .in violation of the criminal laws of the United States or any State, relating to gambling, extortion, blackmail, narcotics, prostitution, and labor

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63. See Blakey & Getting, *supra* MAIN TEXT note 3 at 1014 n.21.

64. See *id.* at 1015 n. 22, n. 23 (reports cited).

65. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 187-210 (1967). "Enterprise criminality" consists of "organized criminal behavior [ranging] from simple political corruption to sophisticated white-collar crime schemes to traditional Mafia-type endeavors." *United States v. Cauble*, 706 F.2d 1322, 1330 (9th Cir. 1983) (quoting Blakey & Gettings, *supra* MAIN TEXT note 3, at 1013-14), *cert. denied*, 465 U.S. 1005 (1984)).

66. The Commission was created by Act of Nov. 9, 1966, Pub. L. No. 89-801, 80 Stat. 1516 (1966). See Blakey, *supra* MAIN TEXT note 3, at 253 n.47.

67. NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS: STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE § 1005 (1970) (defining "criminal syndicate" as "an association of ten or more persons for engaging on a continuing basis in [certain predicate crimes]"). The predicate crimes were those "which experience has shown to be the specialties of the criminal syndicates." *Consultant's Report on Conspiracy and Organized Crime*, I WORKING PAPERS: NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 381, 383-84 (1970) (Professor G. Robert Blakey).

68. S. 2187, 89th Cong., 1st Sess. (1965), 111 Cong. Rec. 14680 (1965).

69. *Id.* at § 2(a).



racketeering.”<sup>70</sup>

Testifying before Senator McClellan’s Committee, Attorney General Nicholas Katzenbach raised constitutional objections to the membership focus of S. 2187.<sup>71</sup> McClellan acknowledged the force of Katzenbach’s testimony.<sup>72</sup> Senator McClellan, therefore, abandoned his membership approach in S. 2187 and adopted the “conduct” approach of RICO. As Professor Michael Goldsmith observes, “by focusing more on conduct, [Senator McClellan in] RICO sought to rectify the constitutional problems raised by S. 2187.”<sup>73</sup>

d. *Business Enterprises*: While Senator McClellan’s legislative efforts focused on enterprise criminality in the underworld, Senator Hruska introduced legislation focused on a separate, but related problem: the infiltration of legitimate business in the upperworld by organized crime. In 1967, Senator Hruska introduced S. 2048 and S. 2049.<sup>74</sup> These two bills were RICO’s other key precursors. S. 2048 proposed amendments to the Sherman Act that would have outlawed the investing of unreported income “in any *business* enterprise” and using the “income to establish or operate. . . such. . . business enterprise.” “Business” was not a word of limitation in Senator McClellan’s earlier syndicate bill; it would be dropped later when the bills were integrated. Drafted to supplement S. 2048, S. 2049 made it illegal for principals in certain specified crimes to invest income from those crimes in “any business enterprise.” The predicate offenses were characteristic of organized crime, not white-collar crime, much less political or social protest.<sup>75</sup> Congressman Richard Poff introduced companion bills to S. 2048 and S. 2049 in the House.<sup>76</sup> No action was taken on these bills but they were studied by the

70. *Id.*

71. CRIMINAL LAW AND PROCEDURES, HEARINGS ON S. 2187 ET AL. BEFORE THE SUBCOMM. ON CRIM. LAWS AND PROC. OF THE SEN. COMM. ON THE JUDICIARY, 89th Cong., 2d Sess. 31-32 (1966). The Committee on Federal Legislation of the Association of the Bar of the City of New York raised similar objections. *Id.* at 306-07 (citing the Smith Act (18 U.S.C. § 2385), prosecutions in *Scales v. United States*, 367 U.S. 203 (1961), and *Yates v. United States*, 354 U.S. 298 (1957)).

72. *Id.* at 37. During the House debate, Congressman Richard Poff, a key House sponsor, expressly recognized the First Amendment issues raised by criminalizing Mafia “membership,” specifically citing Katzenbach’s testimony on S. 2187, 116 Cong. Rec. 35344 (1970).

73. Michael Goldsmith, *RICO and Enterprise Criminality: A Response to Gerard E. Lynch*, 88 COL. L. REV. 774, 776-86 (1988).

74. S. 2048, 90th Cong., 1st Sess. (1967); 113 Cong. Rec. 18007 (1967); S. 2049, 90th Cong., 1st Sess. (1967); 113 Cong. Rec. 18007 (1967); 113 Cong. Rec. 17997-18002 (1967).

75. In introducing S. 2048 and S. 2049, Senator Hruska stated:

The second bill, S. 2049, would prohibit the investment in legitimate business enterprises of income derived from specified criminal activity—especially those criminal activities engaged in by members of organized crime families such as gambling, bribery, narcotics, extortion and the like.

113 Cong. Rec. 17999 (1967) (emphasis supplied).

76. H.R. 11266 90th Cong., 1st Sess. (1967); H.R. 11268, 90th Cong., 1st Sess. (1967); 113 Cong. Rec. 17946, 17976 (1967). In introducing his bills, Congressman Poff stated:

[t]he first bill would outlaw the investment of income derived from specified criminal activities in

American Bar Association.<sup>77</sup>

In the 91st Congress, Senator Hruska introduced a new bill, S. 1623, "The Criminal Activity Profits Act", that reflected elements from S.2048 and S.2049.<sup>78</sup> Once again, Senator Hruska explained that the focus of his bill was on offenses characteristic of organized crime, not white-collar crime or political or social protest.<sup>79</sup> S.1623 included in its definition of "criminal activity" many, but not all, of the offenses that would be later incorporated in RICO.<sup>80</sup>

e. *Organized Crime Control Act*: On January 15, 1969, Senators McClellan and Hruska introduced S.30, "The Organized Crime Control Act."<sup>81</sup> As introduced, S.30 did not include RICO-type provisions. RICO was later incorporated into S.30 as Title IX.

Senators McClellan and Hruska merged their two independent, but complementary, approaches to "enterprise criminality"—in the underworld and in the upperworld—when they cosponsored S. 1861, "The Corrupt Organizations Act," which was introduced on April 18, 1969.<sup>82</sup> S. 1861 combined McClellan's concern with underworld organizations with Hruska's concern with infiltration of legitimate business. Senator McClellan explained that the focus of the legislation was on the various methods of "organized crime."<sup>83</sup> S. 1861 also dropped the word "business" from the phrase "business enterprise" in S. 1623, RICO's predecessor legislation, not to *eliminate* its commercial dimension, but to *expand* its scope

legitimate business. The activities specified are those typical of syndicate conduct. They include gambling, bribery, extortion, counterfeiting, narcotics traffic, and white slavery.

113 Cong. Rec. 17947 (1967) (emphasis supplied).

77. See Blakey and Gettings, *supra* MAIN TEXT note 3, at 1016-17 (analysis of Bar Association recommendations).

78. S. 1623, 91st Cong., 1st Sess. (1969); 115 Cong. Rec. 6992-96 (1969). 12

79. In introducing S. 1623, Senator Hruska stated:

In the 90th Congress I sponsored two bills, S. 2048 and S.2049 which were essentially similar to the bill I introduce today \* \* \* The bill is a synthesis of both of those bills, incorporating all of their features into a unified whole. It attacks the economic power of organized crime and its exercise of unfair competition with honest businessmen on two fronts—criminal and civil . . .

Last year, . . . the American Bar Association examined the two earlier bills, S.2048 and S.2048, and endorsed the principles and objectives of both. \* \* \* As a result of the ABA Recommendation [to enact the bills outside of the antitrust statutes], the single new bill has been drafted as an amendment to title 18 of the United States Code with self-contained enforcement and discovery procedures.

115 Cong. Rec. 6993 (1969) (emphasis supplied).

80. See S.1623, 91st Cong. 1st Sess. § 1(1)(1969); 115 Cong. Rec. 6995 (1969).

81. S.30, 91st Cong., 1st Sess. (1969); 115 Cong. Rec. 769 (1969). See generally *Measures Relating to Organized Crime: Hearings on S.30 S. 994, Before the Subcomm. on Crim. Laws and Proc. of the Sen. Comm. on the Judiciary*, 91st Cong., 1st Sess. 4-29 (1969) (hereinafter, "SENATE HEARINGS"); *Organized Crime Control, Hearings on S.30 and Related Proposals before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970) ("HOUSE HEARINGS").

82. S. 1861, 91st Cong., 1st Sess. (1969); 115 Cong. Rec. 9566 (1969).

83. 115 Cong. Rec. 9567 (1969).

beyond *legitimate* businesses to *illegitimate* enterprises.<sup>84</sup>

The introductory language of S.1861 was similar to the introductory language of S.30, which, in turn, was derived from Senator McClellan's 1965 legislation, S.2187.<sup>85</sup> S.1861 was incorporated into S.30 as Title IX (RICO).<sup>86</sup> When S.1861 was incorporated into S.30, and reported out of the Judiciary Committee, the "predicate crimes associated with white-collar activity were [also] added to the text."<sup>87</sup> Accordingly, the scope of RICO as applying to white-collar crime as well as organized crime was perfected.

The scope of the remedial features of RICO was shaped in the House. S. 1623. As introduced, the bill contained not only criminal penalties but also private antitrust-type civil remedies.<sup>88</sup> Nevertheless, S. 1861, as introduced and as incorporated into S.30, was silent on a private claim for relief.<sup>89</sup> While S.30 was pending in the House, the American Bar Association endorsed it, making suggestions, including a private treble damage claim for relief "based upon the concept of Section 4 of the Clayton Act."<sup>90</sup> Senator McClellan termed the suggestion "constructive."<sup>91</sup> It was incorporated into the bill as it was passed by the House<sup>92</sup> was accepted by the Senate,<sup>93</sup> and was signed by the President.<sup>94</sup>

Nothing in these legislative developments reflects an intent on the part of RICO's sponsors, in the Senate or House, to permit the statute to be applicable, beyond its antitrust counterparts, to political or social protest. The final text of RICO joined themes of combatting organized crime and other syndicated activity as well as the infiltration of legitimate entities by criminal groups. Investment, takeover, and operation were prohibited; the objective was a marketplace, not only free, but characterized by integrity. To circumvent the membership problem, RICO focused not on joining a group, but on participating in its affairs through a pattern of criminal conduct. The criminal activities included in the statute were character-

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84. Goldsmith, *supra* APPENDIX H note 73, at 780. This change is confirmed by the Senate Report, which states that § 1961 "defines" enterprise to include associations in fact, as well as legally recognized associative entities." S. Rep. 617 at 158.

85. 115 Cong. Rec. 9568 (1969).

86. Sen. Rep. at 83. The incorporation of S. 1861 into S.30 was anticipated by Senator McClellan when he introduced the bill: "Its provisions might well be incorporated by way of amendment into S.30 itself." 115 Cong. Rec. 9567 (1969).

87. Goldsmith, *supra* APPENDIX H note 73, at 787; 264 n.78; 268-79.

88. S. 1623, 91st Cong., 1st Sess. §§ 3, 4(1969). The American Bar Association endorsed the private enforcement mechanism of RICO in the Senate Hearing. See *supra* APPENDIX H note 81, at 558.

89. See Blakey *supra* MAIN TEXT note 3, at 262 n.71.

90. HOUSE HEARINGS, *supra* APPENDIX H note 81, at 534-44 (statement of Edward L. Wright, President of the American Bar Association).

91. 116 Cong. Rec. 25190 (1970). Other Senators also endorsed the private enforcement mechanism. 116 Cong. Rec. 36296 (1970) (statement of Sen. Dole).

92. *Id.* at 35363.

93. *Id.* at 36296-64.

94. *Id.* at 37264. The President called for civil remedies, including the treble damage provision, when he endorsed S. 30 in his Message on Organized Crime, reprinted in, SENATE HEARINGS, *supra* note APPENDIX H note 81.

istic of organized and white-collar crime, not political or social protest. The remedies, too, were principally economic (forfeiture, treble damages for injury to business or property, etc.). Accordingly, it would be beyond congressional authorization if RICO were applied to curtail political or social protest by reading "extortion" to mean "extortion" and "coercion."

f. *Predicate Acts*: The principal of selection used to include the predicate acts in RICO confirms the statute's circumscribed dimension on this issue. When a subset is selected from a set, much can be learned about the character of the subset by examining the set itself. This can be done with RICO. Its legislative history demonstrates two movements. One direction narrowed the predicate offenses to *exclude* political or social demonstration; the other enlarged the predicate offenses to *include* white-collar crimes.<sup>95</sup>

The predicate offenses included in Title IX were narrowed from earlier bills. As originally introduced, S.1861 defined "racketeering activity" to include "any act involving the danger of violence to life, limb, or property, indictable under State or Federal law and punishable by imprisonment for more than one year . . . ."<sup>96</sup> Two objections were raised to this definition. The Department of Justice opposed it because of its indeterminate breadth and on the grounds of federalism.<sup>97</sup> The Department suggested an amendment to narrow the definition to specified offenses "customarily invoked against organized crime."<sup>98</sup> This suggestion was adopted by RICO's sponsors. On the other hand, the American Civil Liberties Union ("ACLU") opposed the breadth of S.30 because of a perceived threat to political or social demonstrations. It testified against the sentencing provisions of S.30 in the Senate hearings.<sup>99</sup> The ACLU also testified against the breadth of the original definition of "racketeering activity," which it found "particularly troublesome."<sup>100</sup> The ACLU

95. See SENATE REPORT, *supra* APPENDIX H note 74, at 83 ("Clarifying, limiting, and expanding amendments have been made . . . ."); see *Russello*, 464 U.S. at 23 ("Where Congress includes particular language in one section. . .but omits it in another. . .it is generally presumed that Congress acted intentionally and purposely.").

96. S. 1861, 91st Cong., 1st Sess. § 3(a) (1969); 115 Cong. Rec. 9569 (1969).

97. Letter from Richard G. Kleindienst, Deputy Attorney General of August 11, 1969, *reprinted in*, SENATE REPORT at 121-26.

98. *Id.* at 122.

99. The ACLU testified:

While it is required that conduct constituting more than one crime as part of a continuing course of activity to be engaged in or caused by one or more of the conspirators to effect the objective of the conspiratorial relationship, it is not clear, in addition to the other ambiguities encompassed in that provision, whether a conviction must have been obtained for the one or more crimes. The language is so broad that it could be regarded as including, in addition to the Mafia or other narcotics or gambling syndicates, a labor strike, a civil rights demonstration or Klan march, an anti-war or pro-war demonstration, or a campus demonstration or counter-demonstration which was expected and planned to result in some sense in a series of crimes (e.g., mass trespass or violation of a parade ordinance) even though the statute or regulation that was the basis of the "crime" is invalid either on its face or as applied.

SENATE HEARINGS, *supra* APPENDIX H note 81, at 472 (statement of Lawrence Speiser).

100. The ACLU testified:

Last year's massive anti-war demonstration at the Pentagon resulted in a number of arrests for acts involving the danger of violence to life, limb or property indictable under state or federal law and

cited the potential impact of S.1861 on "the campus disorders which racked Columbia University a year ago April."<sup>101</sup>

In response, the Senate Judiciary Committee adopted two amendments to RICO. First, when the Committee incorporated S.1861 into S.30 as Title IX, it eliminated one aspect of the broad definition of "racketeering activity" ("danger of violence to life, limb or property") and replaced it, as the Department of Justice suggested, with specifically designated state offenses. Significantly, when the Senate debated the 1970 Act, the ACLU continued to oppose Title X (sentencing), but it favorably noted the responsive changes in Title IX (RICO).<sup>102</sup>

Second, the Senate Judiciary Committee expanded the specific federal offenses to include offenses characteristic of white-collar crime, an amendment suggested by the Securities and Exchange Commission.<sup>103</sup> Accordingly, between the introduction of S.1861, its incorporation into Title IX, and the reporting of the combined bills to the Senate,<sup>104</sup> the Judiciary Committee *expanded* "racketeering activity" beyond the subset of offenses reflected in the Penal Reform Commission's proposal to include white-collar offenses<sup>105</sup> and, in response to the concern of the ACLU, *narrowed* the subset of offenses to preclude its application to political or social protest. As reported, RICO was an attack on the activities of organized crime and white-collar crime but not on political or social protest.

Senator McClellan commented on the predicate offenses at a later point. Significantly, he explained the rationale of RICO, indicating that the principle of

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punishable by imprisonment for more than one year. . . offenses of the kind which resulted from the demonstrations in connection with the anti-war protest movement could fall within the definition of pattern of racketeering activity of the bill. . . .

*Id.* at 475-76 (statement of Lawrence Speiser).

101. The ACLU testified:

This was a group activity which resulted in arrests, involved the danger of violence to property, and involved offenses for which imprisonment for more than a year was possible. Under § .1861, Mr. [James Simon] Kunen [author of "Strawberry Statement," describing his participation in the campus disorders] could not lawfully invest any of the proceeds from his book. Whatever one may think of the offenses or the offenders in these hypotheticals, and questions of whether or not their activity is in any way protected by constitutional guarantees aside, it is clear that this proposed legislation is in no way intended to subject them to the penalties described. Nevertheless, there is absolutely nothing in the bill to prevent them from being so used.

*Id.* at 476.

102. "The substantive provisions of Title IX have been substantially revised so as to eliminate most of the previously objectionable features." 116 Cong. Rec. 854 (1970) (ACLU statement put into the record by Sen. Young).

103. REPORT OF THE AD HOC CIVIL RICO TASK FORCE: A.B.A. SEC. CORP. BANKING & BUS. L. at 99-100 n.130 (1985).

104. SENATE REPORT, *supra* APPENDIX H note 74, at 21-22. As amended by the Committee, the Statement of Finding and Purpose expressly mentions "fraud," and "racketeering activity" includes mail fraud, wire fraud, transportation fraud, bankruptcy fraud, and securities fraud. *See* Blakey, *supra* MAIN TEXT note 3, at 268.

105. *See supra* APPENDIX H note 87.

selection for the predicate offenses was "commercial exploitation."<sup>106</sup> In particular, the Bar Association of the City of New York attacked RICO, then Title IX, objecting to the Senate Report that said the predicate offenses were offenses "characteristically . . . [committed] . . . by members of organized crime."<sup>107</sup> The Bar Committee complained that the subset was too inclusive because it included offenses that were committed by persons not engaged in organized crime. Senator McClellan responded to the Bar Committee that he was aware that the statute was not limited to organized crime, as well as to the other objections of the ACLU, in an address after passage in the Senate, but while RICO was pending in the House.<sup>108</sup> Senator McClellan's point was repeated in a law review article he wrote, which was published during the consideration of the bill by the House.<sup>109</sup> Thus, McClellan explained the criterion by which the predicate acts were selected for inclusion in RICO: they were commercial, not political.

Congress' understanding that political and social protest was excluded from RICO may also be seen by comparing the scope of Title IX (RICO) with Title X (Dangerous Special Offender Sentencing). Title IX's application is limited by a specific list of designated crimes. Title X, however, was made applicable to all "felonies."<sup>110</sup> During Senate debate, Senator Edward Kennedy objected to Title X, expressing the concern that anti-war protestors, such as "Dr. [Benjamin] Spock," might be "subjected to special sentencing."<sup>111</sup> He proposed to amend Title X to make its application limited "to those convicted of the crimes" designated in Title IX of RICO.<sup>112</sup> Kennedy argued that Title X's scope ("any felony") would extend it to anti-war protesters, such as Dr. Spock, or to policemen who violate civil rights.<sup>113</sup> To exclude such individuals from Title X, Senator

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106. 116 Cong. Rec. 18940 (1970).

107. The Senate Report described "racketeering activity" as "includ[ing] crimes most often associated with organized crime, especially those associated with the infiltration of legitimate organizations." SENATE REPORT, *supra* APPENDIX H note 74, at 158.

108. 116 CONG. REC. 18940 (1970) (emphasis supplied).

109. John L. McClellan, *The Organized Crime Control Act (S.30) or It Critics: Which Threatens Civil Liberties?*, 46 NOTRE DAME LAW REV. 57, 161-62 (1970). Significantly, Senator McClellan's article was cited as an authoritative interpretation of RICO by Congressman Poff during the House debate. 116 CONG. REC. 35298 (1970).

110. Title X was codified at 18 U.S.C. § 3575. It was repealed by Pub. L. 98-473, Title II, chapter II, § 212(a)(2)(1984), 98 Stat. 1987 (1984).

111. 116 CONG. REC. 845 (1970). Dr. Benjamin Spock was convicted of conspiring to violate the Selective Service Act by staging sit-ins at armed services recruitment centers, draft card burnings, and demonstrations, but his conviction was reversed on appeal and remanded for a new trial. *United States v. Spock*, 416 F.2d 165, 168 & n.2 (1st Cir. 1969). Dr. Spock's anti-war conduct closely parallels the allegations against Respondents: sit-ins, demonstrations, and press conferences, mass surrenders of draft cards, and card burnings.

112. 116 Cong. Rec. 845 (1970).

113. The ACLU expressed the same concern about Title X:

"In addition to organized crime cases, this provision might be read as applying to civil rights activists or political demonstrators (where a pattern of 'criminal' conduct might be a series of technical trespasses). The Dr. Spock case and the pending case of the Chicago 7 come to mind."

116 CONG. REC. 855 (1970) (ACLU statement introduced by Senator Young).

Kennedy proposed an amendment to limit Title X to the specified offenses in Title IX, by substituting for "any felony" in Title X the list of offenses in Title IX.<sup>114</sup> In response, Senator McClellan argued for making Title X applicable to "any felony," and he objected to limiting Title X to offenses specified in Title IX.<sup>115</sup> "It seems to me," Senator McClellan argued, "that it would be a grave mistake to restrict dangerous offender sentencing to any list of specified offenses supposedly typical of organized crime."<sup>116</sup> Senator Kennedy's amendment failed to pass.<sup>117</sup>

Obviously, this exchange demonstrates an informed judgment of Senators McClellan and Kennedy that Title IX would not include Dr. Spock, that is, Title IX did not apply to political or social protest. Senators Kennedy and McClellan thought that if Title X were limited to the specific list of offenses in Title IX, Dr. Spock would be excluded from Title X. Accordingly, the intent of the key sponsor of RICO, Senator McClellan, not to have it applicable to political or social protest is manifest.<sup>118</sup>

The principle of selection used to exclude certain offenses from RICO provides further confirmation that RICO was consciously designed not to impact first amendment freedom. Had Senators McClellan or Hruska wanted to make RICO applicable to political or social protests, they had only to add "coercion" to the list of state offenses. Since it is not in the predicate offenses, it ought now to be added in effect by the interpretation of "extortion" to include "coercion."

Title 18 U.S.C. § 2101 is conspicuous by its absence from the list of predicate federal offenses.<sup>119</sup> The omission of the anti-riot provisions of § 2101 in RICO is also crucial in light of the roles played in the enactment of § 2101 by Senators McClellan and Hruska, the two principal sponsors of RICO in the Senate. Both were aware of the statute. Had either wanted RICO to cover illegal demonstrations, little effort was required to add § 2101 to the list of predicate federal offenses.

Between November, 1967 and August, 1969, Senator McClellan, as chairman of the Senate Permanent Subcommittee on Investigation, held 71 days of hearings on

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114. *Id.* at 845-46.

115. *Id.* at 846.

116. *Id.* at 845.

117. *Id.* at 849.

118. The isolated comment in the House debates that RICO might apply to some undefined "counter-revolutionary activity" is entitled to little weight. 116 CONG. REC. 35326 (1970) (statement of Cong. Rarich) It is not the informed commentary of a sponsor. *S & E Contractors v. United States*, 406 U.S. 1, 13 n.9 (1972).

119. 18 U.S.C. § 2101(a)(1) (1994) in pertinent part, provides:

Whoever travels in interstate or foreign commerce or uses any facility of interstate or foreign commerce. . . .with intent—(A) to incite a riot. . . .Shall be fined not more than \$10,000. . . .

18 U.S.C. § 2102(a) (1994), in pertinent part, provides:

As used in this chapter, the term "riot" means a public disturbance involving. . . .an act or acts of violence by one or more persons part of an assemblage of three or more persons, which act or acts shall constitute a clear and present danger of, or shall result in, damage or injury to the property of any other person or to the person of any other individual. . . .

riots and other civil disorders.<sup>120</sup> After H.R. 421 passed the House, the Senate Judiciary Committee held 13 days of hearings on it. H.R. 421 was the legislation that first proposed adding § 2101 to Title 18.<sup>121</sup> Senators McClellan and Hruska each chaired a day of those hearings.<sup>122</sup> Senator Hruska spoke on the floor<sup>123</sup> in favor of the amendment to the Civil Right Act of 1968<sup>124</sup> that added § 2101 to Title 18.<sup>125</sup> Senators McClellan and Hruska also voted for the amendment.<sup>126</sup> Accordingly, Senators McClellan and Hruska were aware of the issue (civil disturbances) and the law (18 U.S.C. § 2101) when RICO was drafted and enacted. Repeatedly, Senator McClellan referred to his own investigations into organized crime, labor racketeering, narcotics, and gambling when he reported S.30 to the Senate<sup>127</sup> and spoke in favor of the bill on the Senate floor.<sup>128</sup> McClellan and Hruska, however, do not mention civil disturbances in speaking in favor of S.30 or Title IX. McClellan does not refer to his work in investigating civil disturbances and neither McClellan nor Hruska refer to his efforts in processing 18 U.S.C. § 2101. Had either wanted to include political or social protest, rather than to exclude it, no doubt they knew how to speak their minds.<sup>129</sup> Twisting RICO to make it applicable to political and social protests by expanding "extortion" to include "coercion" is inappropriate.

9. *Conclusion*: "Obtaining" in 18 U.S.C. § 1951(a) means "taking". It requires not only that the victim lose property, tangible or intangible, but that the perpetrator or a third person "get" it. "Obtaining" does not, in short, mean "to deprive" or "to part with."<sup>130</sup>

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120. *Riots, Civil and Criminal Disorder, Hearings before the Sen. Permanent Subcomm. on Investigations of the Comm. on Government Operations*, 90th and 91st Cong., 1st and 2nd Sess., Parts 1-234 (1967-1969).

121. H.R. 421, 90th Cong., 1st Sess. (1967); *Anti-Riot Bill 1967: Hearings before the Comm. on the Jud.*, 90th Cong., 1st Sess. Parts 1 & 2 (1967).

122. *Id.* Part 1 at 353 (August 7, 1967) (McClellan); *Id.* Part 2 at 753 (August 28, 1967) (Hruska).

123. 114 CONG. REC. 5211 (1968) (statement of Sen. Hruska)

124. Pub. L. 90-284, 82 Stat. 73 (1968).

125. 114 CONG. REC. 5033 (1968).

126. *Id.* at 5214 (1968) (the amendment passed 82 to 13).

127. SENATE REPORT, *supra* APPENDIX H note 74, at 76-78.

128. 116 CONG. REC. 585 (1970).

129. See also Title XI of S. 30, 84 Stat. 952-60 (1970), which enacted Chapter 40, Importation Manufacture, Distribution and Storage of Explosive Materials (18 U.S.C. § 841 *et. seq.*). The crimes enacted in Title XI were not included in the list in Title IX (RICO). Title XI was "prompted" for inclusion in the legislation "by the national emergency of criminal bombings brought into dramatic focus by the recent tragedy at the University of Wisconsin." 116 Cong. Rec. 35201 (1970) (statement of Cong. Poff). Not including the new offenses, Title IX was consistent with the desire not to have RICO applicable to political or social protest. *Russello*, 464 U.S. at 23.

130. The analysis of this Appendix is in general accord with the Gnaig M. Bradley, *NOW v. Schieidler: RICO meets the First Amendment*, SUPREME COURT REVIEW 1994 129 (1995).



## APPENDIX I (SECURITIES FRAUD REFORM)

Over a presidential veto, Congress enacted securities law reform on December 22, 1995.<sup>1</sup> Its sponsors promised it would curtail improper securities litigation, particularly securities-based RICO legislation. In fact, the legislation, a triumph of special interest pleading, promised more, not less litigation, as the issues it raises are more numerous than the questions it purports to settle. The only proposition it illustrates well is that Congress can reform RICO when it wants to. Courts ought not assume otherwise, as a rationale for their own efforts to rewrite it themselves. The story of the enactment of the 1995 reform legislation merits telling in all its ugly details.

1. *RICO Reform Legislation*: In 1985, the securities industry and the accounting profession urged the Supreme Court in *Sedima*<sup>2</sup> to circumscribe civil RICO with a criminal conviction limitation; they were unsuccessful, for statutory and policy reasons.<sup>3</sup> Efforts to reform RICO after *Sedima* then focussed on Congress.<sup>4</sup> The securities industry and the accounting profession again played leading roles,<sup>5</sup> telling Congress that the Court's decision in *Sedima* opened the "floodgates."<sup>6</sup> The "Floodgate Myth," however, is flatly false.<sup>7</sup> Civil RICO suits were also said to be "abusive." Here, too, the "Litigation Abuse Myth" is flatly false.<sup>8</sup> The allegations in 1985 against RICO echo unwarranted allegations by the business community against the antitrust statutes in 1890 and 1914.<sup>9</sup>

Similarly the securities industry and the accounting profession were vigorous in their fight against the securities statutes that sought in the 1930's to underwrite their integrity in the capital markets.<sup>10</sup> The Securities Act of 1933 encountered both open and undercover resistance from brokers and investment bankers. The president of the New York Stock Exchange led the fight against securities

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1. 141 Cong. Rec. § 191180 (daily ed. Dec. 22, 1995).

2. 473 U.S. at 480-1.

3. *Sedima v. Imrex Co., Inc.*, 473 U.S. 479, 493 (1985) ("[W]e can find no support in the statute's history, its language, or considerations of policy for a requirement that a private treble-damages action under § 1964(c) can proceed only against a defendant who has already been criminally convicted."). The Court summarized the policy objections that it found particularly persuasive of false statements, half truths, and special interest pleading, Congress at its policy and technical worst. 473 U.S. at 490 n.9. The criminal conviction limitation itself is analyzed in greater detail and rejected on similar policy grounds in 133 CONG. REC. 29,294 (1987) (remarks of Rep. John Conyers); the general common law approach, which rejects limiting civil recovery by the results of criminal proceedings, is traced in Leigh A. MacKenzie, Note, *Civil RICO: Prior Criminal Conviction and Burden of Proof*, 60 NOTRE DAME L. REV. 566 (1985).

4. See, e.g., *Oversight on Civil RICO Suits: Hearings Before the Senate Comm. on The Judiciary*, 99th Cong., 1st Sess. (1985) [hereinafter *1985 Hearings*].

5. *1985 Hearings* at 629-39 (securities), 243-325 (accountants).

6. *Id.* at 631 (securities), 288 (accounting).

7. Blakey & Perry, *supra* MAIN TEXT note 3, at 869-73 (allegations and data analyzed).

8. *Id.*, *supra* MAIN TEXT note 3, at 877-79 (allegations and data analyzed).

9. Blakey & Caesar, *supra* MAIN TEXT note 3, at 562 n.181 (Sherman Act).

10. *Id.* at 562 n.183; JOEL SELIGMAN, *THE TRANSFORMATION OF WALL STREET* 79 (1982); James M. Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29, 30 (1959).

regulation by the federal government.<sup>11</sup> In addition, Price Waterhouse & Co. was “opposed to . . . requirements for independent accountants.”<sup>12</sup> The Investment Bankers Association issued a statement decrying the Act and asserting that its “practical results . . . [would] be to suspend the underwriting or distribution of many capital issues . . . .”<sup>13</sup> The 1933 Act then, like RICO today, was subject to “misinterpretation, deliberate to a great degree, by the widely publicized utterances of persons prominent in the financial world together with their lawyers.”<sup>14</sup> In fact, Congress enacted the Securities Act in the 1930’s because state law was inadequate to deal with “racketeering” on Wall Street.<sup>15</sup> Following a parallel approach, a concerted drive in Congress was made after *Sedima* to reform RICO by amending it to include the judicially rejected criminal conviction limitation.<sup>16</sup>

Broadly, representatives of segments of the business community found themselves pitted against consumer groups and state attorney generals.<sup>17</sup> At first, the Department of Justice presented able testimony against the criminal conviction limitation; it also supported the provision of a private enforcement mechanism and it expressed considerably less alarm than the opponents of civil RICO with the various allegations of RICO abuse.<sup>18</sup> The Department of Justice’s love affair with the concept of private civil enforcement, however, turned out to be a September to July romance.<sup>19</sup> Theodore C. Barreaux, Vice President of the American Institute of Certified Public Accountants, attributes the Department of Justice’s switch from opposition to support of a criminal conviction limitation for civil RICO to a series of meetings between accounting institute lawyers and Department officials.<sup>20</sup> Significant, too, was a change in personnel—the substitution at the position of the Deputy Attorney General in the Department of Justice for D. Lowell Jense, a widely respected and experienced federal and state prosecutor, of Arnold I. Burns,

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11. *Seligman*, *supra* APPENDIX I note 10, at 90.

12. *Landis*, *supra* APPENDIX I note 10, at 35 n.12.

13. *Id.* at 40 n.18.

14. *Id.*

15. See, e.g., 77 CONG. REC. 3801 (1933) (statement of Sen. Duncan Fletcher, leading sponsor of the Securities Act of 1933) (the Securities Act is “designed to protect the public from the financial racketeering of . . . ‘investment bankers’ . . .”).

16. See generally Richard Corrigan, *Rolling Back RICO*, 18 NAT’L J. 2114, 2114-15.

17. *Id.*

18. 1985 *Hearings* at 141 (“Analysis of the available evidence seems to suggest that the collective weight of [the burdens that private civil RICO action have imposed on legitimate businessmen, on the federal courts, and on the federal civil justice system] may not be as great as is claimed, and that the burdens in individual cases may be balanced by the social value of the remedy’s availability against large-scale, systematic illegality.”).

19. Compare Letter from Assistant Attorney General John R. Bolton to Vice President George Bush (Ju. 22, 1986) (“The Department of Justice believes . . . [that the criminal conviction limitation] would best respond to the increasingly troublesome issues that civil RICO” raises), with Letter from Acting Assistant Attorney General Philip D. Brady to Congressman John Conyers (Sept. 30, 1985) (“[W]e do not believe that . . . [the criminal conviction limitation] is the best approach to limiting the scope of civil RICO.” Brady added, “the Department also believes that the preferable course would not include the elimination of treble damages and attorneys’ fees for successful private litigants in civil RICO cases.”).

20. Corrigan, *supra* APPENDIX I note 16, at 2115.

a prominent New York corporation and securities lawyer, who was outspoken in his opposition to civil RICO.<sup>21</sup> Legislation passed the House,<sup>22</sup> but failed by two votes in the Senate.<sup>23</sup>

Subsequently, a major effort was made to impose a purchaser-seller limitation on RICO.<sup>24</sup> Such legislation was reported in 1990.<sup>25</sup> Writing special rules for one industry, however, is controversial.<sup>26</sup> The bill failed to pass, and subsequent reform proposals no longer contained special rules for specific industries.<sup>27</sup> These discredited legislative efforts to reform RICO were successfully revived in 1995.

2. *Securities Litigation Act: House Debate*: It took ten years, but the securities and the accounting profession succeeded in overturning *Sedima* in The Private Securities Litigation Reform Act of 1995, which was introduced in the House of Representatives by Thomas J. Bliley (R-Va.) on February 27, 1995.<sup>28</sup> Not new data or new arguments, but newly-minted politicians carried the day. The measure originally appeared as Title II of H.R. 10, the Common Sense Legal Reforms Act of 1995, introduced January 4, 1995.<sup>29</sup>

Title II was—purportedly—designed to reduce abusive securities litigation, and it contained, among other things, an amendment to RICO to disallow civil RICO actions based on securities fraud. H.R. 10 was referred to the House Commerce and Judiciary Committees.<sup>30</sup> The House Subcommittee on Telecommunications & Finance held hearings on Title II on Jan. 19, 1995 and Feb 10, 1995. The Commerce Committee ordered Title II reported as amended on Feb. 24, 1995.<sup>31</sup> At this point, however, it contained no RICO provision. Title II was renamed H.R. 1058, and it was introduced on the House floor; it contained provisions regarding professional and lead plaintiffs, appointment of class counsel, safe harbor for forward-looking statements, pleading standards, proportionate liability, fee shifting, and other matters relating to private securities litigation, H.R. 1058,<sup>32</sup> but it still contained no provision regarding RICO. H.R. 1058 was referred to the House

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21. See, e.g., *Deputy Attorney General Burns Discusses Role of Special Masters, Caseloads, Other Concerns, The Third Branch*, Mar. 1987, at 5 (“[B]ankers, merchants, insurance company agents . . . are sued under the civil RICO statute . . . and that is a terrible thing.”).

22. 132 CONG. REC. 29,309 (1986).

23. 132 CONG. REC. 32,504 (1986).

24. 133 CONG. REC. 23,405 (1987) (statement of Rep. Conyers).

25. S. REP. NO. 101-269 at 20 (1990) (reporting S. 438).

26. 134 CONG. REC. 33,557 (1988) (statement of Rep. Conyers) (“I see no reason to give the likes of Boesky or Butcher in their stock fraud or bank fraud activities a special bill of relief.”).

27. See H.R. REP. NO. 101-975 at 8 (1990) (reporting H.R. 5111) (S. 438 rejected because it “would go too far in certain respects and give the appearance of favoring certain industries such as the commodities, securities, and savings and loan industries which are currently the subject of major fraud investigations.”).

28. H.R. 1058, 104th Cong., 1st Sess. (1995).

29. H.R. 10, 104th Cong., 1st Sess. (1995), 141 CONG. REC. H124 (daily ed. Jan. 4, 1995).

30. 141 CONG. REC. H124 (daily ed. Jan. 4, 1995).

31. H.R. REP. NO. 104-50 at 1 (1995).

32. 104th Cong., 1st Sess. (1995).

Commerce and Judiciary Committees,<sup>33</sup> which held hearings and reported on their respective areas of jurisdiction.

RICO was not discussed and, as reported, the bill still contained no RICO provision; it reached the House floor March 6, 1995.<sup>34</sup> Fourteen amendments were offered on the floor of the House. On March 6, 1995, Rep. Cox (R-Calif.) introduced Amendment No. 4, which proposed to exempt from civil RICO liability under 18 U.S.C. § 1964(c) any conduct actionable as securities fraud.<sup>35</sup> Rep. Cox is knowledgeable about securities fraud suits.<sup>36</sup> The amendment was debated at length. Rep. Cox began his statement by saying his amendment “would prevent plaintiffs’ attorneys from bringing actions alleging securities law violations under” RICO.<sup>37</sup> It was, along with the bill itself, necessary to curb “frivolous securities litigation.”<sup>38</sup> It sought “only to reform RICO in the area of securities legislation.”<sup>39</sup> The RICO reform language was, he said, in the original version of the securities bill, but it was “omitted from the bill . . . inadvertently” when the Commerce and Judiciary portions were combined.<sup>40</sup>

Rep. Conyers (D-Mich.) flatly denied Cox’s assertion, and he insisted that, although mentioned in the original bill, its exclusion was intentional.<sup>41</sup> Conyers observed, “[o]n this pretext, anything that was not put in the bill could have been accidentally left out . . . I guess we accidentally did not have any hearings. I guess there accidentally were not any witnesses. I guess this was all an accident that needs to be corrected right now.”<sup>42</sup> Rep. Conyers continued, “[t]he provision of this amendment is broader than any attempt at a modification of RICO, and the gentleman knows it.”<sup>43</sup>

Nevertheless, Cox maintained that the RICO amendment was necessary to “address a significant number of frivolous actions based on alleged securities law violations . . . .”<sup>44</sup> He noted that the Securities Exchange Commission supported RICO reform for over ten years, culminating in SEC Chairman Arthur Levitt’s testimony before the House Commerce Committee in support of restrictions on

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33. 141 CONG. REC. H2306 (daily ed. Feb. 27, 1995).

34. *Id.* at H2716 (daily ed. March 6, 1995).

35. *Id.* at H2717.

36. See Jeff Gerth, *Architect of House Measure To Limit Lawsuits Is Himself the Subject of a Suit*, N.Y. TIMES, June 18, 1995, col. 1, p.20 (receiver of collapsed investment group bringing action seeking damages for scam that cost thousands of investors more than \$125 million; actions by lawyers, including Cox, allegedly prevented scheme from being uncovered earlier by federal and state authorities; three principals in scheme pleaded guilty to federal fraud; Cox partner terms suit “baseless.”).

37. 141 CONG. REC. H2770 (daily ed. March 6, 1995).

38. *Id.*

39. *Id.*

40. *Id.* at H2765.

41. *Id.*

42. *Id.* But see *id.* at H2775. (Rep. Fields (R-Tex) observing the RICO amendment was omitted from the version reported out of committee by “sheer error.”).

43. *Id.* at H2765.

44. *Id.* at H2771.

civil RICO liability.<sup>45</sup> Without his amendment, Cox argued, any reform of securities litigation would be meaningless, because securities fraud could almost always be characterized as mail or wire fraud, and then be actionable under RICO, with its treble damages and attorney fees. Without his amendment, plaintiffs lawyers could, therefore, bypass the carefully crafted incentives, liabilities, and remedies of federal securities law, which limit recovery to actual damages; accordingly, unamended, RICO provided an end run around securities law reform.<sup>46</sup> Plaintiffs who possess no chance of recovery under the reformed securities laws could still "extort settlements from innocent defendants" with RICO's fraud predicates and its "treble damage blunderbuss."<sup>47</sup> Rep. Fields (R-Tex.) outlined key differences between litigating securities fraud under the reformed securities law as opposed to RICO: "H.R. 1058 . . . has a losers pay provision. RICO does not. H.R. 1058 preserves a one year statute of limitation. The RICO statute of limitations is longer. H.R. 1058 limits joint and several liability to knowing securities fraud; RICO does not."<sup>48</sup> Rep. Cox also termed RICO's applicability to securities fraud a "loophole."<sup>49</sup> Rep. Bryant (D-Tex.), however, read Cox the language of the statute as enacted in 1970, which explicitly included securities fraud in RICO. He asked, "how can you describe this as a loophole?"<sup>50</sup> In the face of the statute's language, Cox, nevertheless, argued that RICO was "never intended to apply to securities cases."<sup>51</sup> Rep. Bryant insisted that RICO's application to securities fraud was "not a loophole"; he also complained that no hearings were held "on the issue of RICO in the committee."<sup>52</sup> Rep. Conyers also emphasized the lack of hearing.<sup>53</sup>

In addition, Conyers pointed out that RICO was successfully used in all of the major securities fraud cases brought recently, and, he noted, RICO was "frequently the only effective means for victims" to recover their substantial losses.<sup>54</sup> The Cox amendment without "a minute's hearing in any of the committees of jurisdiction" would now declare that remedy to be no longer needed. "[T]his is the most outrageous proposal in terms of securities regulation that I have ever heard."<sup>55</sup> He countered the position of the Securities Exchange Commission against RICO with the positions of the Association of Attorneys General, the National Association of Insurance Commissioners, the U.S. Conference of May-

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45. *Id.*

46. *Id.* at H2771.

47. *Id.*

48. *Id.* at H2775.

49. *Id.* at H2771.

50. *Id.*

51. *Id.* at H2771-72.

52. *Id.* at H2772.

53. *Id.* at H2773.

54. *Id.*

55. *Id.*

ors, and the North American Securities Administrators.<sup>56</sup> It was, he said, “very clear that public prosecutors and regulators. . . [were] aghast at the Cox amendment. . . .”<sup>57</sup> RICO was “critical in the fight against savings and loan fraud, bank and insurance [fraud], and financial crimes.”<sup>58</sup> He warned, “[d]o not throw the baby out with the bath water.”<sup>59</sup> Rep. McCollum, a supporter of the amendment, advanced the argument that RICO was “originally intended to strike a major blow to organized crime and racketeering”, and it was an abuse to use RICO against “routine” fraud in the context of commercial and securities disputes.<sup>60</sup> The augmented remedies of civil RICO were, he argued, “designed to help private citizens strike back against criminal enterprises and other corrupt organizations. But they were never intended to be used as a means to litigate disputes between parties to bona fide securities transactions.”<sup>61</sup>

The organized crime myth is flatly false.<sup>62</sup> McCollum’s argument was answered by Rep. Dingell (D-Mich.); he pointed out that Congress placed securities violations within the scope of civil RICO “from the very first day that it was enacted into law,” and “[t]here is not one scintilla of evidence in the record of the Committee on Commerce whether we should or we should not” change that.<sup>63</sup> He continued: “[m]y colleagues never saw this language in the committee. We never knew it was coming until late last night, when the Committee on Rules decided that something should be done about this matter. No discussion was offered in the committee. The author of the legislation had nothing to say on this subject.”<sup>64</sup> Rep. Dingell went on to argue that the United States has the most trusted securities market in the world, for two reasons: “good enforcement at the SEC,” and “an extraordinarily good system of private enforcement . . . .”<sup>65</sup>

I have told the securities industry time after time, people think that the securities industry and the markets in this country run on money. They do not. They run on public confidence. . . . What we are doing here is sneaking out of the Committee on Rules a proposal to repeal RICO, and it is not going to contribute to the trust of the American people in the securities market or in the marketplace.

The only confidence that is going to be boosted by this amendment is going to be the confidence of rascals and scoundrels, who will then be secure in the knowledge that if they engage in theft of resources belonging to others, they

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56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at H2774.

62. Blakey & Perry, *supra* MAIN TEXT note 3, at 800-68.

63. 141 CONG. REC. H2774 (daily ed. March 6, 1995).

64. *Id.*

65. *Id.*

are not going to get sued. That is all.<sup>66</sup>

Rep. Markey (D-Mass.) also made the telling point that the amendment would eliminate any civil RICO liability for Mafia involvement in the securities industry; he said that when his subcommittee held hearings on penny stock fraud in 1989 and 1990, it "had to have . . . witnesses testify with bags over their heads because of the fear of retaliation by organized crime in the penny stock market of this country."<sup>67</sup> The penny stock market was, he said, "rife with organized crime."<sup>68</sup> Rep. Dingell also criticized the "sloppy" drafting of the amendment.<sup>69</sup>

Ironically illustrating why, as he himself argued, floor debate should be preceded by thorough hearings and carefully drafted committee reports, he made the statement that the language of the amendment would allow anyone involved in racketeering to avoid civil RICO liability so long as they were also involved in securities fraud.<sup>70</sup> The amendment would act as an incentive, he said, for criminals to get involved in securities, whatever else they were doing. A racketeer whose pattern of racketeering included murder, narcotics, interstate gambling, and securities fraud, for example, would "get a wash" of civil RICO liability for all of the predicate offenses, because securities fraud was part of the pattern.<sup>71</sup> This, he said, would disallow even what the amendment's proponents conceded was the central aim of RICO: to destroy the incentives of racketeering and allow organized crime victims to recover their loss.<sup>72</sup>

Not responding to Dingell, Cox and other proponents emphasized that the proposed securities reforms were designed to stop such abuses as "strike suits" and "shakedowns," in which plaintiff lawyers bring massive lawsuits against small, vulnerable companies merely because their stock price dropped. The lawyers, they argued, "sue everyone connected to the company . . .—officers, board members, accountants, lawyers . . .—and then sit back and do discovery and continue the litigation until somebody says, wait a minute, we have had enough, here is 10 cents on the dollar."<sup>73</sup> In RICO lawsuits, the range of discoverable material stretches back ten years because of the pattern element; all of the careful work done to reform securities litigation would be futile, they argued, if RICO remained available to prosecute civil securities fraud.<sup>74</sup> The amendment passed the House March 7, 1995, by a recorded vote of 292 to 124.<sup>75</sup>

3. *Securities Litigation Act: Senate Debate*: A companion bill, S. 240, 104th

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66. *Id.*

67. *Id.* at H2777.

68. *Id.*

69. *Id.* at H2778.

70. *Id.*

71. *But see infra* APPENDIX I note 108 *et seq.*

72. *Id.* at H2778.

73. *Id.* at H2775 (statement of Rep. Tavzin).

74. *Id.* at H2778.

75. 141 CONG. REC. H2778-79 (daily ed. March 7, 1995).

Cong., 1st Sess. (1995) was introduced in the Senate January 18, 1995, by Senators Dodd and Domenici, and referred to the Senate Banking, Housing, and Urban Affairs Committee.<sup>76</sup> It contained a RICO provision essentially identical to the House's Cox Amendment.<sup>77</sup> The Subcommittee on Securities held hearings on the bill March 2, 22, and April 6, 1995.<sup>78</sup> During testimony before the Subcommittee on these dates, Arthur Levitt, chairman of the SEC, suggested to the Subcommittee the adoption of an amendment that would "[e]liminat[e] the overlap between private remedies under RICO and the Federal securities laws."<sup>79</sup> He stated that "most parties. . . concur" in this recommendation.<sup>80</sup> In his prepared statement to the Subcommittee, he wrote:

For many years the Commission has supported legislation to eliminate the overlap between the private remedies under the Racketeer Influenced and Corrupt Organizations Act ("RICO") and under the Federal securities laws. Because the securities laws generally provide adequate remedies for those injured by securities fraud, it is both unnecessary and unfair to expose defendants in securities cases to the threat of treble damages and other extraordinary remedies provided by RICO.

Although a recent Supreme Court decision substantially narrowed the liability of professional advisers under RICO, issuers and other market participants continue to be exposed to RICO claims in securities cases. These claims tend to coerce settlements and force defendants to litigate issues that would not otherwise arise in securities cases. Congressional action continues to be needed, and we endorse the measures addressing this issue that are included both in the Domenici-Dodd bill and the House bill. (footnotes omitted)<sup>81</sup>

The Association of the Bar of the City of New York, on the other hand, strongly opposed elimination of RICO liability:

We oppose this proposal, which arbitrarily singles out one type of action, or perhaps one industry, for an exemption from the civil RICO principles applicable to all other cases. If civil RICO is to be amended, changes should follow systematic study and be introduced systematically. The present proposal, in part because it rips securities actions from the context of other RICO actions, is both ambiguous and, we believe, unworkable.<sup>82</sup>

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76. 141 CONG. REC. S1070 (daily ed. Jan. 18, 1995).

77. *Id.* at S1076-78.

78. *Securities Litigation Reform Proposals S. 240, S. 667, and H.R. 1058: Hearings Before the Subcommittee on Securities of the Committee on Banking, Housing, and Urban Affairs*, 104th Cong., 1st Sess. 1 (March 2, 22, & April 6, 1995).

79. *Id.* at 232.

80. *Id.* at 230.

81. *Id.* at 251.

82. *Id.* at 356.



The bill was favorably reported out of the Senate Banking, Housing, and Urban Affairs Committee by a vote of 11-4, on June 19, 1995.<sup>83</sup> The report discussed the same purported securities litigation abuses—strike suits, baseless litigation brought for settlement value, professional plaintiffs—as found in the House reports and debates.<sup>84</sup> Regarding the amendment to RICO, the majority of the committee reported:

The SEC has supported removing securities fraud as a predicate act of racketeering in a civil action under the Racketeer Influenced and Corrupt Organizations Act ("RICO").

. . . .

The Committee amends Section 1964(c) of Title 18 of the U.S. Code to remove any conduct that would have been actionable as fraud in the purchase or sale of securities as a predicate act of racketeering under civil RICO. The committee intends this amendment to eliminate securities fraud as a predicate act of racketeering in a civil RICO action. In addition, a plaintiff may not plead other specified offenses, such as mail or wire fraud, as predicate acts of racketeering under civil RICO if such offenses are based on conduct that would have been actionable as securities fraud.<sup>85</sup>

None of those voting against the committee report addressed the RICO issue in their minority comments.

The full Senate began consideration of the bill June 22, 1995.<sup>86</sup> In the opening debate on the bill, RICO was not mentioned. The debates were consumed by the issues of proportionate liability, pleading standards as to state of mind, safe harbor for forward-looking statements, aiding and abetting liability, chilling effect on meritorious litigation, and proper balance of marketplace incentives. Eighteen amendments were offered, concerning proportionate liability, statute of limitations on private rights of action, aiding and abetting liability, effect on senior citizens and qualified retirement plans, appointment of lead plaintiffs, safe harbor provisions, insider trading, pleading requirements, and other matters. Sen. Biden, however, interrupted the general debate on other amendments to introduce an amendment to the RICO provision in the bill; he stated the effect of the bill's RICO provision as it stood—the first time it was mentioned on the floor—and said he thought it was "a bad idea," but that he would not debate the issue then.<sup>87</sup> His amendment provided that civil RICO liability would apply in cases of securities fraud where the defendant was previously convicted of an offense in connection with the fraud. In addition, the statute of limitations for the RICO action would begin to run from the date on which the conviction became final. The amendment

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83. S. REP. NO. 104-98 at 1 (1995).

84. *Id.* at 6-24.

85. *Id.* at 19.

86. 141 CONG. REC. S8885 (daily ed. June 22, 1995).

87. 141 CONG. REC. S9163 (daily ed. June 27, 1995).

was accepted, and it was summarily agreed to.<sup>88</sup> The Senate then struck everything after the enacting clause of H.R. 1058 and inserted the text of S. 240. As so amended, H.R. 1058 passed the Senate June 28 by a vote of 70 to 29.<sup>89</sup>

4. *Securities Legislation Act: Conference Committee and Veto Override*: The conference committee between the Senate and the House spent little time in its report discussing the RICO provision; the report merely quoted the Levitt language that appeared in the Senate Banking report and repeated the intent of the conference committee that plaintiffs not be allowed to recharacterize securities fraud as wire or mail fraud; the exception to the exception to allow civil actions where the defendant had a prior criminal conviction for the fraud was also carried forward. The conference report states:

The SEC has supported removing securities fraud as a predicate offense in a civil action under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). SEC Chairman Arthur Levitt testified: "Because the securities laws generally provide adequate remedies for those injured by securities fraud, it is both necessary and unfair to expose defendants in securities cases to the threat of treble damages and other extraordinary remedies provided by RICO."

The Conference Committee amends section 1964(cv) of title 18 of the U.S. Code to remove any conduct that would have been actionable as fraud in the purchase or sale of securities as racketeering activity under civil RICO. The Committee intends this amendment to eliminate securities fraud as a predicate offense in a civil RICO action. In addition, the Conference Committee intends that a plaintiff may not plead other specified offenses, such as mail or wire fraud, as predicate acts under civil RICO if such offenses are based on conduct that would have been actionable as securities fraud.<sup>90</sup>

As amended, 18 U.S.C. § 1964 provides:

§ 1964. Civil remedies

....

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, *except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final*

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88. *Id.*

89. 141 CONG. REC. S9219 (daily ed. June 28, 1995).

90. H.R. Conf. Rep. No. 104-369, 104th Cong., 1st Sess. 42-43 (1995).

(emphasis added to new text). Both the House and Senate passed the bill as it was reported from the conference committee, the Senate on December 5, 1995, by a vote of 65 to 30,<sup>91</sup> and the House on Dec. 6, by a vote of 320 to 102.<sup>92</sup> President Clinton vetoed the bill Dec. 19, 1995; his veto message objected to the bill's pleading standards, safe harbor provision, and Rule 11 provisions; it did not mention the amendment to RICO.<sup>93</sup> The House, likewise, did not mention the RICO provision in its debate before overriding the veto, which occurred on Dec. 20, 1995 by a vote of 319 to 100.<sup>94</sup> In the Senate debate on the veto override, Sen. Specter only mentioned in passing that the bill contained an exception to RICO liability for securities fraud, but no substantive discussion of the matter took place.<sup>95</sup> The vote was 68 to 30.<sup>96</sup>

5. *Analysis of Elements of the 1995 Exception:* The exception to civil RICO liability created by the 1995 Act is, of course, yet to be extensively tested in litigation against the contentions of counsel or forged against the anvil of the facts of actual controversies. Until it is, its scope can be only tentatively essayed. The likelihood is, however, that the comment of the Association of the Bar of New York City that the exception is "ambiguous" will turn out to be prescient. Unresolved issues abound. The next text of § 1964(c) contains an exception that, at least on its face, contains four elements: (1) security, (2) purchase or sale (3) fraud, and (4) actionable conduct. The exception to the exception contains five elements: (5) conviction, (6) in connection with, (7) fraud, (8) final, and (9) statute of limitations. Each of these elements will be the subject of litigation.

(1) *Security:* 18 U.S.C. § 1961(1) defines "racketeering activity" to mean "any offense involving. . . fraud in the sale of securities. . . punishable under any law of the United States." "Security" is not defined in RICO. "Security" is defined in § 2(1) of the Securities Act of 1933.<sup>97</sup> Similar definitions are found in other federal securities statutes.<sup>98</sup> The exception will be applicable only if a "security" is involved. Conventional corporate securities—stocks and bonds—are readily identifiable. Not every financial instrument, however, is a "security." Beginning in 1946, the Supreme Court interpreted "security" in a number of decisions.<sup>99</sup> These

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91. 114 Cong. Rec. 5 17997 (daily ed. Dec. 5, 1995).

92. *Id.* H.14055 (daily ed. Dec. 6, 1995).

93. H. Doc. No. 104-150, 104th Cong., 1st Sess. (1995).

94. 141 CONG. REC. H15,214-15 (daily ed. Dec. 19, 1995).

95. 141 CONG. REC. S19,047 (daily ed. Dec. 21, 1995).

96. 141 CONG. REC. S19,180 (daily ed. Dec. 22, 1995).

97. § 2(1), 48 Stat. 74 (15 U.S.C. § 77(b)).

98. *See, e.g.*, Securities Exchange Act of 1934, § 3(a) (10), 48 Stat. 881 (15 U.S.C. § 78(c)).

99. *See, e.g.*, *Reves v. Ernst & Young*, 494 U.S. 56, 60-76 (1990) (a "note" is a "security" depending upon a four factor test); *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685-97 (1985) (sale of business by transfer of stock is a "security"); *Marine Bank v. Weaver*, 455 U.S. 551, 555-61 (1982) (a certificate of deposit is not a "security"); *Int'l Broth. of Teamsters v. Daniel*, 439 U.S. 551, 558-70 (1979) (interests in non-contributory pension plans are not "securities"); *United Housing Foundation v. Forman*, 421 U.S. 837, 847-58 (1975) (share of stock in cooperative housing corporation is not a "security", since not an investment for profit); *Tcherephn v.*

decisions, as well as similar courts of appeal decisions, will, of course, now control the scope of the 1995 RICO exception. Role reversals, however, can be anticipated. Previously, defense counsel argued that particular instruments were not "securities" to avoid the detriment of the application of federal securities statutes; plaintiff's counsel, on the other hand, argued that particular instruments were "securities" to obtain the benefit of the federal securities statutes. Since civil RICO offers more attractive remedies, that is, treble damages, attorney's fees, etc., the interests of these advocates will be reversed. If the instrument implicated in the fraud is a "security," RICO will not apply; if the instrument is not a "security," RICO may apply to the fraud, if the other elements of RICO are met.<sup>100</sup>

(2) *Purchase or sale*: Only purchasers or sellers may sue for securities fraud under the securities statutes.<sup>101</sup> RICO's application to securities fraud does not, of course, extend to claims for relief not involving offenses involving "fraud in the sale of securities."<sup>102</sup> Nevertheless, RICO claims for relief for securities fraud are, arguably, not limited by the purchaser or seller rule of the securities statutes.<sup>103</sup> If a third party, not a purchaser or seller, can meet the proximate cause requirement of *Holmes*<sup>104</sup> his RICO claim for relief should go forward. The purpose of the 1995 exception to RICO was to eliminate "the overlap" between RICO and the securities statutes; it would be perverse to construe the 1995 legislation to create a "gap" between RICO and the securities statutes where no relief at all would be afforded a victim of a securities fraud under either statutory scheme.

Similarly, suits for securities fraud are limited to claims brought against principals; aiding and abetting claims are not authorized under the securities statutes.<sup>105</sup> Circuit courts of appeals are extending *Central Bank of Denver* to conspiracy claims.<sup>106</sup> RICO, however, contains express aiding and abetting and conspiracy liability.<sup>107</sup> RICO claims for relief against secondary parties under either an aiding and abetting or conspiracy theory are, therefore, not within the 1995 exception.

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*Knight*, 389 U.S. 332, 335-46 (1967) (withdrawable capital shares of a savings and loan are "securities" for 1934 Act, but not 1933 Act); *SEC v. Variable Annuity Life*, 359 U.S. 65, 66-73 (1959) (a variable annuity is a "security"); *SEC v. Howey Co.*, 328 U.S. 293, 301 (1946) (an investment contract is a "security" depending on a four factor test).

100. *See, e.g.*, 18 U.S.C. § 1341 (mail fraud); 18 U.S.C. § 1343 (wire fraud), 18 U.S.C. § 1344 (bank fraud), 18 U.S.C. § 2314 (travel fraud).

101. *Pinter v. Dahl*, 486 U.S. 622, 641-55 (1988) (seller includes solicitor for financial purposes); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 731-55 (1975) (plaintiff who was induced not to buy shares not purchaser or seller).

102. *First Pacific Bancorp, Inc. v. Bro.*, 847 F.2d 542, 546 (9th Cir. 1988) (§§ 13(d) and 14(e) of '34 Act do not involve fraud in sale of securities within RICO).

103. *Holmes v. Securities Investor Protector Corp.*, 503 U.S. 258, 279 (1992) ("[N]any person' cannot reasonably be read to mean only purchasers and sellers of securities.") (O'Connor, J. concurring).

104. 503 U.S. at 268-69, 272 n.19, 276.

105. *Central Bank of Denver v. First Interstate Bank of Denver*, 114 S. Ct. 1439, 1445-55 (1994).

106. *See, e.g.*, *In re Glenfed., Inc. Securities Litigation*, 60 F.3d 591, 592 (9th Cir. 1995).

107. 18 U.S.C. §§ 2, 1962(d).

(3) *Fraud*: Both the securities statutes and RICO apply to “fraud.”<sup>108</sup> If particular conduct can be characterized as “fraud in the purchase or sale of securities,” it should fall within the exception, however an artful pleader recharacterizes it. The text of the 1995 exception, however, says “conduct that would have been actionable as fraud”; conduct that would not have been actionable as fraud is, therefore, not covered. Rep. Dingell’s ill-spoken suggestion that the 1995 exception covers *all* conduct in a pattern that includes, at least in part, fraud is not supported by the text of the statute. Here, too, construction of the 1995 exception should avoid the creation of a “gap” in coverage between the two regimes—RICO and the securities statutes. To change the plain meaning of the text, legislative history must be “clearly expressed.”<sup>109</sup> Indeed, under the Supreme Court’s current approach to statutory interpretation, legislative history will seldom, if ever, warrant departing from the text. Despite impressive support in the legislative history, the argument that RICO was limited to conduct motivated by financial gain failed to attract a single vote in *NOW v. Scheidler*.<sup>110</sup> Rep. Dingell was neither a sponsor nor a manager of the amendment.<sup>111</sup> As he was not a sponsor or in charge of the bill, Rep. Dingell’s comments, self-confessed the product of a first reading of the provision, ought to be “with out [sic] weight in the interpretation of” the amendment.<sup>112</sup>

The prohibition in the legislative history of the use of other offenses to recharacterize securities fraud as a different offense may well stand on a different footing; it is expressed unequivocally in authoritative parts of the legislative history, most clearly in the conference report. Nevertheless, since the intent to preclude “artful pleading” is not expressed on the face of the statute, even here, arguably, the legislative history cannot alter the plain text.<sup>113</sup> Congressional wishes are not part of the operative language of the statute. Consistent with *NOW*, this legislative history may have to be revisited with the passage of appropriate text, therefore, if this intent is to be more than precatory.

(4) *Actionable Conduct*: Reliance on a claim for relief under RICO for

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108. See generally *supra* APPENDIX B (“DEFRAUD”) (scope of fraud in federal law); *First Pacific Bancorp Inc. v. Bro*, 847 F.2d 542 (9th Cir. 1988). RICO, however, embraces other offenses. See, e.g., 18 U.S.C. § 1961 (extortion, bribery, etc.).

109. *Turkette*, 452 U.S. at 580.

110. 114 S. Ct. 798 (1994). Compare *id.* at 806, with Brief of Respondent Joseph M. Scheidler et. al., No. 92-780, Oct. 1993, pp. 22-41 (arguing that Congress’ express desire in the legislative history to preclude RICO’s applications to anti-war protestors precluded its application to non-commercial activity, including anti-abortion protestors.) See *supra* APPENDIX H (discussing the legislative history of “extortion.”).

111. See *Lewis v. United States*, 445 U.S. 55, 63 (1980) (manager’s comments entitled to “weight”); *Galvan v. Press*, 347 U.S. 522, 527 (1954) (sponsor’s comments “weighty gloss”).

112. *McCaughn v. Hershey Chocolate Co.*, 283 U.S. 488, 494 (1931); accord, *S & E Contractors v. United States*, 406 U.S. 1, 13 n.9 (1972). “This is especially so with regard to . . . legislative opponents who ‘[i]n their zeal to defeat a bill. . . understandably tend to overstate its reach. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 203-04 n.24 (1976) (citations omitted).

113. See e.g., *Shannon v. United States*, 114 S. Ct. 2419, 2426 (1994) (legislative history, even clearly expressed, not permitted to control decision).

securities fraud is precluded under the 1995 exception for “any conduct that would have been actionable.” “Actionable conduct” promises to be the most litigated phrase in the 1995 exception. Any difference between recovery under the securities statutes and RICO for securities fraud, where recovery is not possible, that is, not actionable, under the securities statutes, but possible, that is, actionable under RICO, promises to be an issue of great contention.<sup>114</sup> The only defensible approach to each issue is to carefully balance the application of the two categories, so that no overlap remains, but no gap—without recovery—securities or RICO—is allowed to open up. A consideration of some of those issues illustrates how contentious these issues will be.

Under the securities statutes, claims for relief for securities fraud, that is, Rule 10b-5 as well as express claims, “must be commenced within one year after. . .discovery. . .and within three years after such violation.”<sup>115</sup> Under RICO, however, the period of the statute of limitations is four years.<sup>116</sup> Nevertheless, in *Malley-Duff*, the Court did not determine “the appropriate time of accrual for a RICO claim.”<sup>117</sup> The courts of appeals are in hopeless disarray on accrual and calculation of damages.<sup>118</sup> The approaches being followed by the courts of appeals are some variation of a “discovery” rule (“knew or should have known”) that focuses on the sufficiency of the acts in the alleged “pattern” for liability and “injury” caused by (“by reason of”) those acts constituting the “pattern”. To the degree that the securities statutes emphasize “violations,” while RICO jurisprudence emphasizes “discovery” and “injury,” the possibility for divergence between the running of the two periods will be substantial, wholly apart from the time period itself (1 and 3 as opposed to 4). Whichever approach is adopted, some claims for relief can be easily foreseen that will not be actionable under the securities statutes, but will be actionable under RICO.<sup>119</sup> This result does not, however, flow inexorably from the text of the 1995 exception; it depends on the point in time when “would have actionable” is to be read: “now,” that is, “would have been actionable at the point in time the suit is filed”, or “previously,” that is, “would have been actionable at the time the conduct was engaged in.” If it is read “now”, RICO will apply; if it is read “previously”, RICO will not apply; the statutory text is, in short, ambiguous. Under *Sedima*, RICO’s liberal construction clause requires that ambiguities in the

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114. For an excellent, comparative analysis of recovery under the two regimes, see generally, Arthur F. Matthews, *Shifting The Burden of Losses in the Securities Markets: The Role of Civil RICO in Securities Litigation*, 65 NOTRE DAME LAW. REV. 896 (1990).

115. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 364 (1991).

116. *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 146-56 (1987).

117. 483 U.S. at 157.

118. See *supra* APPENDIX C (IMPLEMENTATION).

119. See, e.g., *Hill v. Equitable Bank*, 655 F. Supp. 631, 638-55 (D. Del. 1987) (securities violation occurs on date of sale; time barred securities offense may be RICO predicate), *aff’d on other grounds*, 851 F.2d 691 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1008 (1989); *accord*, *Gilmore v. Berg*, 807 F. Supp. 1176, 1181 (D.N.J. 1992).

statutory text be resolved in favor of remedy, not against it.<sup>120</sup> Accordingly, "actionable conduct" should be read to mean actionable "now", that is, at the time the suit is filed.

The scope of RICO as a continuing offense is also problematic in light of "actionable" under the statute of limitations; it is best illustrated by way of an example. Suppose that a "pattern" includes multiple acts of racketeering. Suppose, too, that but for the last act, which is conduct actionable, in fact, as fraud in the purchase or sale of a security, the "pattern" would be outside the period of limitation, however the period of limitations is calculated. May the last act be counted, not "to establish the violation of section 1962"—the other acts do that sufficiently—but to make the claim for relief timely? Obviously, no damages could be collected in light of the 1995 exception for the injury done by the last act, but could damages be collected for the prior acts? Nothing in the text of the exception ought to be read to preclude this result.

The question of degree of liability is also problematic in light of "actionable". Under Section 201 of the Private Securities Litigation Reform Act of 1995, liability is joint and several, but proportionate; it is also subject to contribution.<sup>121</sup> RICO liability, however, is joint and several without contribution or indemnity.<sup>122</sup> Does "actionable" mean "actionable entirely" or "actionable in part". If it means "actionable entirely" that portion not actionable under the securities statutes would be actionable under RICO; if it means "actionable in part," no part of the claim could be brought under RICO, even though it was not actionable under the securities statutes. The matter is in doubt, but here the result most in keeping with the spirit, if not the text, of the exception would be no recovery.

(5) *Conviction*: The exception to the 1995 exception requires a "person" to be "criminally convicted." The exception to the exception is unqualified.<sup>123</sup> The conviction may, therefore, be under federal, state, or foreign law; it may be for a felony, a misdemeanor, or otherwise; and it may be for fraud or any other offense.

(6) *In connection with*: The phrase "in connection with" is part of the jurisprudence of the securities statutes.<sup>124</sup> These decisions, too, as well as the

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120. *Sedima* 473 U.S. at 491 n.10 ("[I]f Congress' liberal-construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident."); *see also*, 84 Stat. 947 (1970) ("shall be liberally construed to effectuate its remedial purposes").

121. *See also* Musick, Peeler, & Garrett v. Employers Ins. of Wausau, 508 U.S. 286 (1993) (§ 10b(5), an implied claim for relief, includes an implied right for contribution).

122. *Fleischhauer v. Feltner*, 879 F.2d 1290, 1300-01 (6th Cir. 1989), *cert. denied*, 493 U.S. 1074 (1990); *Friedman v. Hartmann*, 787 F. Supp. 411, 415 (S.D.N.Y. 1992) (no right to contribution); *In Re Olympia Brewing Co. Securities Litigation*, 674 F. Supp. 597, 616 (N.D. Ill. 1987); *Boone v. Beacon Bldg Corp.*, 613 F. Supp. 1151, 1154 (D. N.J. 1985) (citing *Texas Industries v. Radcliff Materials*, 451 U.S. 630 (1981) (no contribution under express claim for relief under antitrust)).

123. *Cf. Turkette*, 452 U.S. at 581 ("enterprise" unqualified; "it could easily have narrowed the sweep of the . . . [phrase] by the inserting a single word").

124. *See, e.g., Holmes*, 503 U.S. at 283 (O'Connor J. concurring); *United States v. Naftalin*, 441 U.S. 768, 773 n.4 (1979); *Superintendent of Insurance v. Bankers Life & Cas. Co.*, 404 U.S. 6, 10 (1971) ("in connection with" means "touching on").

similar decisions of courts of appeals, should govern the scope of the 1995 exception to RICO liability.

(7) *Fraud*: Element (7) grammatically refers back to element (3). It should be similarly interpreted.<sup>125</sup>

(8) *Final*: Under the general federal rule, criminal convictions are final when entered.<sup>126</sup> That rule is not universally followed in the states, which have traditionally taken other approaches.<sup>127</sup> Under 28 U.S.C. § 1738 (“full faith and credit”), federal courts must give to state court judgments that degree of finality accorded them under state law.<sup>128</sup> Finality will, therefore, have varying meanings depending on the jurisdiction in which the conviction is obtained.

(9) *Statute of Limitations*: Unfortunately, the 1995 exception does not specify the statute of limitations to which it refers. Two come readily to mind. In 1990, Congress enacted 26 U.S.C. § 1658, which provides that “a civil action arising under an Act of Congress enacted after . . . [1990] may not be commenced later than 4 years after the cause of action accrues.” The 1995 exception may be read to eliminate securities fraud as a predicate act for civil purposes from the 1970 Act, but to create a new claim for relief for securities fraud, where it occurs in connection with conduct for which a conviction is obtained. If so, the exception to the 1995 exception will constitute “a civil action arising under an Act . . . enacted after” 1990; the period of limitation, therefore, will be four years from when “the cause of action occurs,” an uncertain date at best traditionally in light of laches and various tolling doctrines.<sup>129</sup> *Malley-Duff*, however, looked to the antitrust statutes for RICO’s period of limitations.<sup>130</sup> Nevertheless, the four-year period of the antitrust statutes is part of a complex scheme, which also suspends the running of the period of limitation during the pendency of civil or criminal proceeding instituted by the United States based “in whole or in part on any matter complained of” in those proceedings and for one year “thereafter”. Arguably, the period within which a RICO claim for relief based on the exception to the 1995 exception is one year after the conviction is final, not four years, as under § 1658 or the general period of the antitrust statute.

Criminal convictions under federal law generally come with five years of the

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125. See, *Reeves*, 507 U.S. at 177-78; *H.J. Inc.*, 492 U.S. at 236; *Sedima*, 473 U.S. at 489.

126. See, e.g., *United States v. NYSO Laboratories, Inc.*, 215 F. Supp. 87, 89 (E.D.N.Y.) (stay pending appeal denied; summary judgment based on conviction granted for injunction), *aff’d*, 318 F.2d 817 (2nd Cir. 1963). See also *Huron Corp. v. Lincoln Co.*, 312 U.S. 183, 189 (1941) (“while appeal . . . stays execution of the judgment, it does not . . . detract from its . . . finality”).

127. See, e.g., *Hosey v. State*, 760 S.W.2d 778, 780 (Tex. Ct. App. 1988) (conviction on appeal was not final for double jeopardy purposes).

128. *Durfee v. Duke*, 375 U.S. 106, 107-16 (1963); *Nowell v. Nowell*, 254 A.2d 889, 893-94 (Conn. 1968) (Texas judgment on appeal not final), *cert. denied*, 396 U.S. 844 (1969).

129. See, e.g., *Burnett v. N.Y. Central RR Co.*, 380 U.S. 424, 426-36 (1965) (tolling based on filing in state court of federal claim); *Holmberg v. Arbrecht*, 327 U.S. 392, 397 (1946) (reading the doctrine of fraudulent concealment applicable “into every federal statute of limitations”).

130. *Malley-Duff*, 483 U.S. at 156-57 (applying 15 U.S.C. § 15(b)’s four year statute of limitations).



conduct.<sup>131</sup> State law, however, varies widely from state to state and offense to offense.<sup>132</sup> Convictions under federal or state law may come, therefore, at considerable periods of time after conduct; the period of limitations will run, therefore, from whenever the conviction is final plus whichever period of limitations is chosen. Accordingly, the criminal conviction exception to the 1995 exception promises years of litigation uncertainty.

(10) *Retroactivity of Sections 107 and 108 of the Reform Act*: One of the final questions to be asked regarding the new legislation is whether §§ 107 and 108 of the Reform Act apply *retroactively*? It requires more extended discussion than the other issues. It should, however, be answered in the negative because Congress's intent, as stated primarily in the express language of the Reform Act, but also expressed secondarily in the Reform Act's legislative history, does not favor retroactive application.

Although the Reform Act was intended to revise both substantive and procedural law governing private securities fraud actions brought under the Securities Act of 1933 and the Securities Exchange Act of 1934, § 107 of the Reform Act adds an exception to civil RICO actions that no person "may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation" of § 1962 of RICO.<sup>133</sup> Section 108 of the Reform Act, which is entitled "Applicability," states that "[t]he amendments made by this title shall not affect or apply to any private action arising under title I of the Securities Exchange Act of 1934 or title I of the Securities Act of 1933, commenced before and pending on the date of enactment of this Act." A clearer statement of intended prospective application could not be written.<sup>134</sup> Thus, the question is squarely joined: Do §§ 107 and 108 of the Reform Act when read together, state or imply *prospective* application of the Act to securities fraud cases, while imposing *retroactive* application for conduct occurring prior to the date of the statute that implicates civil RICO?

The federal courts hold that "[t]here is a strong presumption against the retrospective application of a statute."<sup>135</sup> The Supreme Court recently set out the

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131. *But see* 18 U.S.C. § 3281 (offenses not punishable by death).

132. *See, e.g.,* OHIO REV. CODE ANN. § 2901.13 (Baldwin 1993 & Supp. 1994) (felony other than aggravated murder or murder, 6 years; misdemeanor other than a minor misdemeanor, 2 years; minor misdemeanor 6 months; fraud or breach of fiduciary duty, 1 year after discovery; public servant, during office or within 2 years thereafter; period does not run when corpus delicti remains undiscovered; period does not run when accused purposely avoids prosecution).

133. Pub. L. No. 104-67, 109 Stat. 737, 758 (1995). *See generally* John W. Avery, *Securities Litigation Reform: The Long and Winding Road to the Private Securities Litigation Reform Act of 1995*, 51 BUS. LAW. 335, 368 (Feb. 1996); James Hamilton, *Private Securities Litigation Reform Act of 1995: Law & Explanation*, ¶112, at 35-36 (CCH 1996) explaining Section 107 of the Reform Act).

134. *See, e.g.,* *In re Numerex Corp. Sec. Litig.*, 913 F. Supp. 391, 396 (E.D. Pa. 1996) ("[B]y its terms, the [Reform] Act does not apply to pending actions") (citing § 108 of Reform Act).

135. *Wetzler v. Federal Ins. Corp.*, 38 F.3d 69, 74 (2d Cir. 1994) (quoting *United States v. Alcan Alum. Corp.*, 990 F.2d 711, 724 (2d Cir. 1993)). The presumption against retroactive legislation is deeply rooted in our

test for determining whether a statute should be applied prospectively or retrospectively:

When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.<sup>136</sup>

In *Landgraf*, after a bench trial in Landgraf's suit brought under Title VII of the Civil Rights Act of 1964, the district court found that she was sexually harassed by a co-worker, but that the harassment was not so severe as to justify her decision to resign her position. Because the court found that her employment was not terminated in violation of Title VII, she was not entitled to equitable relief and, because Title VII did not then authorize any other form of relief, the district court dismissed her complaint.<sup>137</sup>

While her appeal was pending, the Civil Rights Act of 1991 became law, § 102 of which includes provisions that create a right to recover compensatory and punitive damages for intentional discrimination in violation of Title VII and authorize any party to demand a jury trial if such damages are claimed. In affirming the district court's decision, the Fifth Circuit rejected Landgraf's argument that her case should be remanded for a jury trial on damages pursuant to § 102.<sup>138</sup> Affirming the Fifth Circuit's decision, in *Landgraf* the Supreme Court held that § 102 of the Civil Rights Act of 1991 does not apply to a Title VII case that was pending on appeal when it was enacted.<sup>139</sup> The analysis used by the Landgraf Court demonstrates why any defendant's arguments concerning the purported retroactive application of § 107 of the Act to a civil RICO action pending or based on conduct occurring before the effective date of the Reform must be rejected.

First, in *Landgraf*, the Supreme Court stated that the text of the Civil Rights Act

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jurisprudence; it embodies legal doctrines centuries older than our Republic. See *Kaiser Alum. & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 842-44 (1990) (Scalia, J. concurring); *Dash v. Van Kleeck*, 7 Johns. \*477, \*503 (N.Y. 1811) ("It is a principle of the English common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect.") (Kent, C.J.).

136. *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1505 (1994) (emphasis added). For a comprehensive analysis of *Landgraf's* application, see *Lindh v. Murphy*, 1996 U.S. App. Lexis 24136 (7th Cir. Sept. 12, 1996) (en banc) (Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, applied retroactively to restrict writ of habeas corpus).

137. *Id.* at 1488.

138. *Id.* at 1488-89.

139. *Id.* at 1489-1508.

of 1991 did not evince any clear expression of congressional intent as to whether § 102 applied to cases arising before the statute's passage. As the Court noted, § 402(a) of the Civil Rights Act of 1991, the provision upon which Landgraf grounded her retroactivity argument, states that "this Act and the amendments made by this Act shall take effect upon enactment." As Justice Stevens observed, "[a] statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to any conduct that occurred at an earlier date."<sup>140</sup> Under the Supreme Court's reasoning, the silence of § 107 of the Reform Act, when combined with § 108's express prospective application, means that § 107 does not have retroactive effect.

Landgraf argued in the Supreme Court that various provisions of the Civil Rights Act of 1991, when read together, "create a strong negative inference that all sections" of the statute "not specifically declared prospective apply to pending cases that arose before" the statute's effective date.<sup>141</sup> In a similar vein, § 107 of the Reform Act does not expressly indicate whether it applies to pending cases. Some defendants may contend, however, that by the same type of "negative inference" unsuccessfully asserted by Landgraf, § 107 must apply retroactively because § 108 of the Reform Act includes express prospective application provision. The *Landgraf* Court rejected this argument:

Applying the entire [Civil Rights Act of 1991] to cases arising from reenactment conduct would have important consequences, including the possibility that trials completed before its enactment would need to be retried. . . . Given the high stakes of the retroactivity question [and] the broad coverage of the statute. . . it would be surprising for Congress to have chosen to resolve that question through negative inferences drawn from two provisions of quite limited effect.<sup>142</sup>

As Justice Stevens concluded, Landgraf's statutory argument "would require us to assume that Congress chose a surprisingly indirect route to convey an important and easily expressed message concerning the [Civil Rights Act of 1991's] effect on pending cases."<sup>143</sup>

Similarly, the strained—and unprecedented—construction of § 107 and § 108 of the Reform Act urging retroactivity would require a court to conclude that

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140. 114 S. Ct. at 1493 (footnote omitted). As the *Landgraf* Court noted, Congress amendment Title VII in 1978 to bar discrimination on the basis of pregnancy; the amendment provided, in pertinent part, that it "shall be effective on the date of enactment." 114 S. Ct. at 1493 n.10. In *Schwabenbauer v. Board of Ed. of School Dist. of Olean*, 667 F.2d 305, 310 n.7 (2d Cir. 1981), the Second Circuit held that the 1978 Amendments did not apply to pending cases.

141. *Id.* at 1493.

142. 114 S. Ct. at 1493-94 (emphasis added). Following this passage of its opinion, the *Landgraf* Court also rejected the argument, based upon the canon of statutory construction "*expressio unius est exclusio alterius*," that "because Congress provided specifically for prospectivity in two places" in the Civil Rights Act of 1991, "we should infer that it intended the opposite for the remainder of the statute." 114 S. Ct. at 1494-95 & n.12.

143. *Id.*

Congress inexplicably chose an “indirect” route to retroactively abolish pending civil RICO actions based upon securities fraud predicate acts or to prevent such suits from being brought based on conduct that occurred before the Reform Act was enacted. If Congress truly sought to distinguish § 107 from § 108’s clearly expressed prospective application, it would have inserted the appropriate retroactive language in either statutory. A court should not accept a defendant’s invitation to apply improperly a “negative inference” and decree retroactive application of § 107 of the Reform Act.

In *Landgraf*, the Supreme Court concluded, after careful review of the “relevant legislative history” of the Civil Rights Act of 1991, that the subject statutory provisions “cannot bear the weight” Landgraf placed upon them. Justice Stevens noted that “[t]he legislative history discloses some frankly partisan statements about the meaning of the final effective date language, but those statements cannot plausibly be read as reflecting any general agreement.”<sup>144</sup>

While a defendant might claim that the Reform Act’s extensive legislative history lends support to the conclusion that Congress did not intend to limit application of the RICO amendment to lawsuits filed after the passage of the Reform Act or prior conduct, this argument is simply wrong. Even after the sparse portions of the floor debate in the House of Representatives a defendant might rely upon are taken with former Senator Danforth’s “large grain of salt,” they do not support the inference that Congress intended § 107 of the Reform Act to apply retroactively. No legislative history supporting retroactive application is present.<sup>145</sup>

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144. *Id.* (footnote omitted). As the Supreme Court observed in *Landgraf*:

The legislative history [of the Civil Rights Act of 1991] reveals other partisan statements on the proper meaning of the Act’s “effective date” provisions. Senator Danforth observed that such statements carry little weight as legislative history. As he put it, “a court would be well advised to take with a large grain of salt floor debate and statements placed in the CONGRESSIONAL RECORD which purport to create an interpretation for the legislation that is before us.” 137 Cong. Rec. § 15325 (Oct. 29, 1991).

114 S. Ct. at 1495 n.15.

145. During the lengthy debate in the House, no mention is made about retroactive application of § 107 to curb or abolish pending civil RICO cases or that that might be subsequently brought based on conduct that occurred before the date of the Reform Act. The only pertinent comment by Rep. John Conyers (D-Mich.), inexorably leads to the conclusion that *prospective* application was intended:

MR. CONYERS. Mr. Chairman, I rise in opposition to the amendment offered by the gentleman from California [Mr. Cox].

Mr. Chairman and members of the committee, this amendment we must never forget, has arrived here by extraordinary means. It was accidentally, just like when you sweep up trash at night in the Committee on the Judiciary. This little slip of paper called RICO fell to the ground in a corner. Nobody noticed it, and, therefore, we have a whole securities bill that went to the Committee on Rules, was dealt with, and then the Committee on Rules came back again and said, “Oh, we overlooked civil RICO, and we have an amendment, not to modify it as it applies to securities, which has been the main use of civil RICO in securities ever since RICO was started. We said we will not pare it down, we will not deal with the other amendments that have always

As the Supreme Court recognized in *Landgraf*, the presumption against retroactivity "will generally coincide with legislative and public expectations."<sup>146</sup> "[R]equiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for countervailing benefits."<sup>147</sup> The language of § 107 of the Reform Act does not evince a clear expression of intent on its application to cases pending before the statute's enactment. Moreover, the legislative history of the Reform Act—and § 107 in particular—does not assist to establish a retroactivity argument. Under these circumstances, the exquisite expressions of "clear congressional intent" are absent and retroactive application of § 107 should not be followed by any court or prior conduct.<sup>148</sup>

In a last-ditch attempt to save a doomed argument, a defendant might claim that it is not improper to apply § 107 of the Reform Act retroactively because it was enacted as an amendment to § 1964(c) of RICO, which they might contend is a purely "jurisdictional" provision, even though the Reform Act does not evince a clear expression of intent on § 107's application to civil RICO pending before December 22, 1996 or based on conduct prior to that date. What this argument ignores, moreover, is that § 1964(c) of RICO is a multi-faceted statutory provision; it is not just a jurisdictional provision, it expressly creates plaintiffs' private right of action to sue defendants for treble damages (as well as other remedies), and it provides that such suits may be brought "in any appropriate United States district court." Thus, § 107 of the Reform Act, which states that "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of Section 1962," is not properly seen as an amendment to RICO's jurisdiction provision; rather, it restricts RICO's definition of "racketeering activity."<sup>149</sup> or activities prohibited by its substantive provisions.<sup>150</sup> Thus, even if § 107 of the Reform Act could be read to apply retroactively, it does not "confer[] or oust[] a district court's jurisdiction over a pending civil RICO case."<sup>151</sup>

As Justice Stevens stated in *Landgraf*, "[s]ince the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless

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applied to RICO before in the Committee on the Judiciary without so much as mentioning this name RICO. We now have a measure in one sentence that will remove it from all securities legislation from this point on.

141 Cong. Rec. H2773 (daily ed. March 7, 1995) (emphasis added).

146. 114 S. Ct. at 1501.

147. *Id.*

148. See *Kaiser Alum.*, 494 U.S. at 837-38 (where prejudgment interest statute at issue evinced "clear congressional intent" that it was "not applicable to judgments entered before its effective date," retroactive application was not countenanced).

149. 18 U.S.C. § 1961(1)(D) (1994) (defining "racketeering activity" to include "fraud in the sale of securities").

150. 18 U.S.C. § 1962(a)-(d) (1994).

151. *Landgraf*, 114 S. Ct. at 1501.

Congress had made clear its intent.”<sup>152</sup> Thus, in *United States Fidelity & Guaranty Co. v. United States ex. rel. Struthers Wells Co.*<sup>153</sup>—a case that the Court cited with approval in *Landgraf*<sup>154</sup>—the Supreme Court construed a statute restricting subcontractors’ rights to recover damages from prime contractors as *prospective* in the absence of “clear, strong and imperative language from Congress favoring retroactivity.”<sup>155</sup> Sections 107 and 108 of the Reform Act, as well as their legislative history, do *not* evince clear congressional intent that § 107 should apply retroactively to civil RICO actions, while § 108 simultaneously applies prospectively to securities fraud actions.

Absent a demonstration of Congressional intent that § 107 of the Reform Act should apply “retrospectively,” a court must presume that it applies only “prospectively.”<sup>156</sup> While the *Landgraf* Court’s opinion contains *dicta* carving out an exception to this rule in the case of so-called “jurisdictional” statutes,<sup>157</sup> that “exception” applies *only* where the statute in question speaks to the *power* of the court rather than to the *rights* and *obligations* of the parties.<sup>158</sup>

Section 107 of the Reform Act does not fall within this class of statutory amendments. It neither confers jurisdiction upon a court nor withdraws jurisdiction; indeed, it does not “speak to the power of” a court.<sup>159</sup> Rather, it affects the rights of defrauded investors to file or continue to process certain types of civil RICO claims for relief after the Reform Act’s effective dates.<sup>160</sup>

Recently commentary supports the argument that prospective application of § 107 of the Reform Act was intended. In an article published in the January 1996 edition of the *RICO Law Reporter*, Dennis Bloc, a prominent defense attorney, flatly stated that “[t]he Reform Act...does not apply to pre-existing lawsuits. . . .”<sup>161</sup> In a recent commentary on the Reform Act published in *RICO disputes Guide* (CCH), John E. Lloyd, a prominent RICO practitioner, concluded

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152. 114 S. Ct. at 1499.

153. 209 U.S. 306 (1908).

154. 114 S. Ct. at 1507.

155. 209 U.S. at 314-15.

156. See *Landgraf*, 114 S. Ct. at 1500; *United States ex. rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1517 (9th Cir. 1995).

157. See *Landgraf*, 114 S. Ct. at 1501-02; see also *United States ex. rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1408 (9th Cir. 1995).

158. See *Landgraf*, 114 S. Ct. at 1502; cf. *Hughes Aircraft*, 63 F.2d at 1517 (*Landgraf* exception applies only to a statutory amendment “explicitly effect[ing] a jurisdictional bar”) (citation omitted).

159. *Landgraf*, 114 S. Ct. at 1502 (citation omitted).

160. See *id.*, cf. *Hughes Aircraft*, 63 F.3d at 1517. In *Vernon v. Cassadaga Valley Cent. School Dist.*, 49 F.3d 886 (2d Cir. 1995), the Second Circuit held that the statute of limitations enacted in the Civil Rights Act of 1991 should apply only to claims filed after its enactment. *Id.* at 889-91.

161. Dennis J. Block & Jonathan M. Hoff, *Newly Enacted Securities Litigation Reform Law*, 23 RICO L. Rptr. 7, 7 (Jan. 1996); see also Dennis J. Block & Jonathan M. Hoff, *Securities and Litigation Reform Law*, N.Y.L.J., Dec. 21, 1995, at 5 (*The Reform Act . . . would not have applied to pre-existing suits*) (emphasis added); Dennis J. Block & Jonathan M. Hoff, *Legislative Proposals to Reform Securities Laws*, N.Y.L.J., May 18, 1995, at 5 (same).

that § 107 applies retroactively. After quoting § 108 of the Reform Act, he states:

he effective date language is not particularly helpful, as a RICO case alleging mail or wire fraud that "would have been actionable as fraud in the purchase or sale of securities" does not arise under title I of the Exchange Act or title I of the Securities Act. Consequently, Section 108 does little to clarify the effective date of the amendments as they apply to a RICO action that does not specifically assert securities fraud. Although the language selected by Congress may be poor, the intent seems relatively clear: that the [Reform] Act shall apply to actions filed after its enactment on December 22, 1995. There is no indication from the language of the Act of an intent to have it applied to actions that are pending but in which judgment has not yet been entered.<sup>162</sup>

In *District 65 Retirement Trust for Members of the Bureau of Wholesale Representatives v. Prudential Securities Inc.*,<sup>163</sup> Judge Hunt of the Northern District of Georgia recently held that § 107 of the Reform Act does not apply retroactively to bar RICO cases that were pending on the date of this enactment. Applying the tests posited by the Supreme Court in *Landgraf*,<sup>164</sup> Judge Hunt concluded that § 107, if applied retroactively, would impair rights that the plaintiffs possessed when they filed their civil RICO claims in 1994:

When plaintiffs filed their complain in 1994, securities fraud and wire and mail fraud based upon actions which could constitute fraud in the purchase or sale of securities were allowable predicate acts in a civil RICO action. Prior to filling their complaint, the statute of limitations for securities fraud action in this case ran. Eliminating predicate acts upon which plaintiffs have rested their complaint for civil RICO remedies, and thereby causing their RICO claims to collapse, impairs the plaintiffs' ability to recover for actions which may have violated federal law. Thus, the statute "would operate retroactively."<sup>165</sup>

"Under *Landgraf*," Judge Hunt noted "the statute should not so function in the

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162. John E. Floyd, *The Private Securities Litigation Reform Act of 1995 and Its Likely Impact Upon Federal and State RICO Litigation*, RICO Bus. Disp. Guide (CCH) ¶9016, at 18,100 (1996) (emphasis added). Similarly, the Office of the General Counsel of the Securities and Exchange Commission has written that "[t]he litigation related provisions [of the Reform Act] do not apply to private actions commenced before and pending on the date of enactment." SEC, 1 Securities Reform Act Litigation Reporter 22, 32 (April 1996) (emphasis added). Indeed, no commentator on the Reform Act, either before or after its enactment, states that a distinction between § 107 and § 108 in terms of their intended prospective application may be validly drawn or even suggests that § 107 should be applied retroactively. See, e.g., Victor H. Boyajian & Glenn E. Davis, *Private Securities Litigation Reform Act of 1995 Likely to Shift Pendulum*, THE METROPOLITAN CORPORATE COUNSEL, at 10 (April 1996); Andrew Rainer, *Private Securities Litigation Reform Act a Step in the Wrong Direction*, MASS. LAWYERS WEEKLY, March 25, 1996, at B8; Victor H. Boyajian & Glenn Davis, *Congress Pushes the Pendulum Back Toward Business*, N.J.L.J., March 4, 1996, at 11; Monte E. Wetzler, *The Private Securities Litigation Reform Act of 1995*, THE METROPOLITAN CORPORATE COUNSEL, at 13 (March 1996); Francis J. Menton, Jr. & Elizabeth S. Strong, *Evaluating Claims Under Reform Act*, Jan. 4, 1996, at 5.

163. Case No. 1:94-CV-3224-WBH, 1996 WL 171563 (N.D.Ga. March 7, 1996).

164. 115 S. Ct. at 1499-1501.

165. 1996 WL 171563 at \*16 (quoting *Landgraf*, 115 S. Ct. at 1505).

absence of 'clear congressional intent favoring such a result.' ”<sup>166</sup> “[A]lthough Congress deliberately chose not to apply the extensive securities law changes retroactively, it did not similarly express its intent with respect to changes standing alone. Congress’s intent is not clearly stated.”<sup>167</sup> Accordingly, Judge Hunt ruled that plaintiffs’ federal RICO claims were not barred by § 107’s amendment to § 1964(c) of RICO.

In *District 65*, Judge Hunt also applied well-settled tenets of statutory construction, concluding that retroactive application of § 107 of the Reform Act could not be justified by labeling § 1964(c) of RICO as a “jurisdictional” statute:

Checking this conclusion by reference to the tenet [of statutory construction,] that the Court must apply the law in effect at the time it renders its decision, the Court first notes that a “vested” right of plaintiff has been affected. I questions of procedural rules or jurisdictional scope are presented. And, to apply the statute retrospectively in light of the Supreme Court’s admonition that retroactive application is disfavored, would work a “manifest injustice” on plaintiffs. No expectations of defendants are altered by this decision. Upon filing of the complaint, defendants were on notice that such claims may be brought, and it was not until after the Court rendered its decision on defendants’ first motion to dismiss that they raised this objection. By following the Supreme Court’s presumption against retroactivity in this case, defendants’ burdens are in no way aggravated.<sup>168</sup>

Judge Pollack in *District 65* subsequently decided *In re Prudential Securities Incorporated Limited Partnerships Litigation*.<sup>169</sup> After an extensive review of the Reform Act’s statutory language and legislative history, Judge Pollack concluded:

The language of the statute expressly states that the provisions applicable to securities fraud actions do not apply retroactively. The statute does not address whether the provisions applicable to RICO applies retroactively or not. It is possible that this failure to provide a clear expression of intent resulted from the rushed nature of the debate and the proposal of the amendment. Whatever the reason, the statute does not include the type of clear expression that the RICO provision is to apply retroactively under the *Landgraf* decision.<sup>170</sup>

(11) *Conclusion*: Little that is charitable may be justifiably said of a number of aspects of the Private Securities Litigation Reform Act of 1995. It reflects the worst

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166. *Id.* at \*16 (quoting *Landgraf*, 115 S. Ct. at 1505).

167. *Id.* (footnote omitted).

168. *Id.* (quoting *Landgraf*, 115 S. Ct. at 1505). Finding that “this is a controlling issue of law to which there is substantial grounds for difference of opinion,” in *District 65*, 1996 WL 171563, at \*16, Judge Hunt certified the issue for immediate appeal to the Eleventh Circuit under 28 U.S.C. § 1292(b).

169. MDL Docket No. 1005, Case No. M-21-67 (MP) (S.D.N.Y. June 10, 1996).

170. Slip op. at 21. Senior Judge Pollack denied defendant’s request that the court certify the issue for immediate appeal to the Second Circuit under 28 U.S.C. § 1292.



policy of the *Ancien Régime*.<sup>171</sup> It is a paradigm of "narrow-interest-group legislation."<sup>172</sup> That is what was bought and paid for is best seen in its partial retroactive impact.<sup>173</sup> How many justifiable suits for securities fraud that already occurred and already inflicted damage will be unjustifiably precluded cannot be reliably determined. Mark Griffin, the chairman of the Securities Litigation Reform Task Force of the North American Securities Administrators Association, estimates that the enactment of the 1995 Act will shut the door over the next five years to 1.79 million investors and deprive them of the right to recover approximately \$2.87 billion dollars.<sup>174</sup> However the figure is estimated, a remarkable "redistribution of wealth from large groups to small ones" was effected by the "Reform Act."<sup>175</sup>

Chief Judge Posner offers suggestions for realistically classifying legislation based on the motive of those who vote on it that could lead to interpreting legislation differently if it were public-interest-based or narrow-interest-group legislation.<sup>176</sup> In fact, Judge Posner advocates an approach of imaginative reconstruction,<sup>177</sup> while Easterbrook, his colleague on the bench and at the University of Chicago Law School, proposes "declaring legislation inapplicable unless it either expressly addresses the matter or commits the matter to the common law (*i.e.*,

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171. See ALEXIS DE TOCQUEVILLE, *THE OLD REGIME AND THE FRENCH REVOLUTION* 67 (Anchor ed 1955) ("It might almost be said that under the old régime everything was calculated to discourage the law-abiding instinct. It was the normal thing for a man filing a petition to ask that in his case a departure should be made from the strict letter of the law, and petitioners showed as much boldness and insistence in such requests as if they were claiming their legal rights.")

172. See RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 262-67 (1983).

173. *Id.* § 108 (applicable to conduct to be litigated under the securities act that occurred before its effective date, but not applicable to pending litigation).

174. Mark Griffin, *Securities Litigation Bill is Reform in Name Only*, N.Y. TIMES, June 25, 1995, at 13, col. 1.

175. Posner, *supra* APPENDIX I note 172, at 264. Compare The Federalist No. 44 at 282-83 (James Madison) (C. Rossiter ed. 1961) ("[Retroactive legislation is] contrary to the first principles of the social compact and to every principle of sound legislation. . . . The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interference, in cases affecting personal rights, become jobs in the hands of the enterprising and influential speculators, and shares to the more industrious and less informed part of the community."), and *Kent v. Gray*, 53 N.H. 576, 580 (1873) (Doe, J.) (retroactive legislation is "wholly irreconcilable with the spirit of our institutions"), with Benjamin J. Stein, *Don't Mess with RICO—Congress Should Spurn Efforts to Curb It*, BARRON'S, July 3, 1989, at 15, col. 4 ("The Congress, like a Dark Ages pope, [ought not] grant retroactive indulgences, plenary and external for fraud, bribery, looting, inside trading, cheating the government and stock manipulation—with no countervailing gain at all except to the treasuries of individual legislators"), and *Tort Reform Is a License to Steal*, N.Y. TIMES, July 30, 1995, p.15 col. 1 ("One of the promises that the Republicans made in their Contract With America was that they would improve the legal system. They pledged, in particular, to "improve" the tort system where securities lawsuits were concerned by making it much harder for people who had been ripped off by managers, lawyers, accountants and investment bankers to get into court, with their case and collect damages. . . . [T]he truth about law and the legal process. . . [is that it] belongs to those who know how to make it and make it for themselves. On Capitol Hill, truth and fairness are variables. Money is a constant "Accountability" and "responsibility" appear to be for those who cannot buy their way out of them.).

176. Compare Posner *supra* APPENDIX I note 172, at 267-93, with Frank H. Easterbrook, *Statutes' Domains*, 50 U. of CHI. L. REV. 533 (1983).

177. *Id.* at 287 ("how would [the] legislators have wanted the statute applied to the case before him").

judicial decision).”<sup>178</sup> Posner’s position echoes Judge Learned Hand in *How Far Is a Judge Free in Rendering a Decision?*<sup>179</sup> Posner, too, recognized that his approach is “nothing new.”<sup>180</sup> He could have added more citations, going further back in history.<sup>181</sup>

“Imaginative reconstruction” of a compromise, however, may not always produce an appropriate outcome. It presupposes a single “lawgiver,” or a group of lawgivers acting under a shared concept of justice, among themselves and with the judge, or at least one which the judge himself can reconstruct. When a sharply divided majority and a minority act under differing conceptions of justice, however, the compromise represents neither sides conception of justice. Indeed, it reflects no conception of justice at all that would permit a judge to reconstruct how the various lawgivers would have acted in an unprovided for or unforeseen case. Posner himself recognizes the problem with interpreting such legislation; if it is “interpret[ed]. . .broadly, [the judge may] give the interest group behind it more than it actually gained in the legislative bargaining process.”<sup>182</sup> Aptly, Hand also wrote *The Contribution of an Independent Judiciary to Civilization*,<sup>183</sup> in which he observed:

[Statutory law]. . .is ordinarily a compromise of conflicts and its success depends upon how far mutual concessions result in an adjustment which brings in its train the most satisfaction and leaves the least acrimony.xxx Such laws do not indeed represent permanent principles of jurisprudence. . .but they can be relatively stable; and, provided that the opportunity always exists to supplant them where there is a new shift in political power, it is of critical consequence that they should be loyally enforced until they are amended by the same process which made them. That is the presupposition upon which the compromises were originally accepted; to disturb them by surreptitious, irresponsible and anonymous intervention (to make them broader or narrower than the legislators drafted them) imperils the possibility of any future settlements and pro tanto upsets the whole system.<sup>184</sup>

Judicially classifying legislation by the motives of the legislators with a view

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178. *Id.* at 552.

179. *SPIRIT OF LIBERTY*, 79-85 (Dilliard ed 1959).

180. Posner, *supra* note 172 at 287 (collecting similar positions).

181. *See, e.g.*, CHRISTOPHER SAINT GERMAIN, *DOCTOR AND STUDENT*, ch. xvi (equity goes beyond letter of law) (Legal Classic ed. 1988); THOMAS AQUINAS, *SUMMA THEOLOGICA*, Part I of 2nd Part, Q. 96 art. 6 (It is permissible to act beside the letter of the law. “Since the lawgiver cannot have in view every single case, he shapes the law according to what happens most frequently. . . . No man is so wise as to be able to take account of every single case and therefore he is not able sufficiently to express in words all those things that are suitable for the end he has in view.”); ARISTOTLE, *NICOMACHEAN ETHICS*, bk v, ch 10 (“when . . . the law lays down a general rule, and thereafter a case arises falling somewhat outside the general model. . . [it is right to] decide[. . .] as the lawgiver would himself decide if he were present on the occasion. . . .”).

182. Posner, *supra* APPENDIX I note 172, at 268.

183. *Id.* at 118-126.

184. *Id.* at 119-20.

towards narrowly or broadly construing legislation is, therefore, problematic. Chief justices from Marshall through Warren to Rehnquist recognize its hazardous character.<sup>185</sup> Evaluating the motives of legislators is best left to political scientists, who have the time, resources, and the talent to essay such matters. Justice Frankfurter struck the proper balance between “imaginative reconstruction” and dry literalism when he wrote:

A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy making might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation. He must not read out except to avoid patent nonsense or internal contradiction. . . [T]he only sure safeguard against crossing the line between adjudication and legislation is an alert recognition of the necessity not to cross it and instinctive, as well as trained, reluctance to do so.<sup>186</sup>

The 1985 Act hardly deserves high praise, but it does merit “loyal” enforcement that neither “enlarges” nor “contracts” it. That is the best that can be charitably said about it.

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185. Compare *Fletcher v. Peck*, 11 U.S. (6 Cranch) 87, 133 (1810) (Marshall, C.J.), and *United States v. O'Brien*, 391 U.S. 367, 383-84 (Warren, C.J.), with *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, [insert] (1981) (Rehnquist, C.J.).

186. *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 533, 535 (1947).